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IN THE
SUPREME COURT OF THE UNITED STATES

LUKE ALLAN FRISBEY,
Petitioner,

v.

BRANDY JO FREED,
Respondent.

On petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

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III. Does MCL §710.39 violate Petitioner's substantive due process rights because it fails to accord the constitutionally required deference to fit fathers who were deceived?

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In re RFF, a Minor, 2000 WL 1206039, _____ Mich. App. _____; ____ NW2d _____ (2000).

In the Matter of RFF, Bay County Circuit Court, Family Division, decided August 3, 1999 (Docket No. 99-4496-AD).

BASIS OF JURISDICTION

The order from which review is sought was entered on October 24, 2000. The statutory provision conferring jurisdiction to this court is 28 USCS §1257(a). The notifications required by Sup. Ct. R. 29.4(c) have been made. Moreover, 28 USCS §2403(b) may apply.

STATEMENT OF THE CASE

This is a direct placement adoption in which the biological mother placed the child for adoption while the biological father opposes it and seeks custody. Brandy Freed and Luke Frisbey dated until September 1998 (June 25, 1999 Transcript of the Bay County Circuit Court, Family Division, P.25). While dating, they engaged in sexual intercourse. (T, P. 7, 25-56). After their breakup, Ms. Freed started dating a young man named Adam. (T, P. 19, 26). Either in November 1998 or January 1999, depending on whose rendition is accepted as fact, Luke Frisbey's or Brandy Freed's respectively, Ms. Freed told Luke that she missed a period. (T, P. 20, 27).

The two did not talk again until, according to Luke Frisbey, mid-December when rumors started in their school that Brandy Freed was pregnant. (T, P. 28). After school resumed from Christmas break, Luke approached Brandy three or four times throughout January and February 1999, asking if she was pregnant. (T, P. 28-29). Each time she denied she was pregnant, telling Luke the rumors were "a bunch of crap." (T, P. 20-21, 28-29). Then, months later, Brandy Freed called Luke on April 14, 1999 and announced she was pregnant, he was the father, she had been to an adoption agency and was placing the baby for adoption. (T, P. 10, 29-30). She further informed him that he would receive documents from the adoption agency in the mail. (T, P. 11).

About April 27, 1999, Luke Frisbey received a letter from Family and Children's Service of Midland, the adoption agency, containing the form Notice to Putative Father and Custody Statement and medical and social history questionnaires. (T, P.32). The letter, from Terry Budek of the

adoption agency, informed him that Ms. Budek's position was "to support all members of the birth family" and that she was to provide services that included advice about "birthparent rights and choices . . . free of charge." Thereafter, on April 30, 1999, Becky and Garry Frisbey, Luke Frisbey's parents, contacted the agency and met the agency worker, Terri Budek, to discuss what was happening and to try to gather information to help in Luke's decision. (T, P.121). Luke was unavailable for the first agency meeting because he was in school. (T, P. 122).

Ryan Francis Freed, the child, was born May 9, 1999, unbeknownst to his father. (T, P. 6, 22). On May 10, 1999, Luke Frisbey and his mother went to the adoption agency planning to consent to the adoption. (T, P. 34). Once there, the Frisbeys called Terri Budek, who was out of the office. (T, P. 34). Over the telephone, Ms. Budek informed them that Ryan Francis had been born the day before. (T, P. 34). Luke was emotionally overwhelmed and left the agency, refusing to

execute the Custody Statement. (T, P. 35). Within a few days, Luke arranged an appointment between himself, Terri Budek, and Luke's parents. (T, P. 36). At the meeting, Luke informed Ms. Budek that he wanted to keep Ryan Francis and that he wanted to see the baby. (T, P. 37). On May 17, 1999, Luke Frisbey was permitted to see his son, hold him and feed him at the agency and in the presence of the prospective adoptive parents. (T, P. 37,123). Thereafter, he retained legal counsel to obtain custody of his son.

During Luke's contacts with the adoption agency before he obtained legal counsel, the agency told Luke that he had a very good chance of obtaining custody of Ryan Francis and that Luke did not need legal representation, that a lawyer would be a waste of money and the matter could be settled without a lawyer. (T, P. 38-40). The agency further informed Luke that the prospective adoptive parents were paying the costs for Ryan Francis when Luke inquired about his providing financial support. (T, P. 40-41). It was not until Luke's third

meeting with Terri Budek that he realized the agency was not going to assist him in obtaining custody of Ryan Francis as he had been led to believe. (T, P. 41). At that meeting, Terri Budek discouraged Luke from pursing his parental rights, claiming that separating the ten-day-old baby from the prospective adoptive parents would be traumatic to the child. (T, P. 42). Luke then sought the aforementioned legal counsel.

The first federal question sought to be reviewed was first raised by Petitioner in his petition for leave to appeal to the Michigan Supreme Court after the Michigan Court of Appeals created the issue in its majority ruling by incorrectly interpreting MCL §710.39. In denying Petitioner's application for leave to appeal, the Michigan Supreme Court held that this issue was not persuasive enough for review. *In re RFF, a Minor*, unpublished opinion per curiam of the Michigan Supreme Court, decided October 24, 2000 (Docket No. 117555 & (42)). The second and third federal questions to be reviewed were raised by Judge Maura D. Corrigan as questions

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the court should review in her dissenting opinion in the Michigan Supreme Court's October 24, 2000 order. *In re RFF, a Minor*, unpublished opinion per curiam of the Michigan Supreme Court, decided October 24, 2000 (Docket No. 117555 & (42)). In denying Petitioner's application for leave to appeal, the Michigan Supreme Court implicitly decided the issues were not persuasive enough for review.

ARGUMENT

I. Where MCL §710.39 creates two categories of putative fathers, do-something fathers and do-nothing fathers, does MCL §710.39 violate Petitioner's substantive due process rights by automatically including him, a neutral father, in the category of a do-nothing father?

As explained below, Michigan courts created a statutory presumption in MCL §710.39 that fathers who do not know anything about the pregnancy until it is too late to provide regular and substantial support and care under MCL §710.39(2) must have their parental rights judged under a best

interests of the child analysis rather than according to abuse and neglect standards. In other words, a father who did not know about the pregnancy through no fault of his own, but because he was deceived, can be terminated under a test more likely to result in termination (best interest of the child), than a father who actually neglects or abuses his child (terminated under the standards of MCL §712A.19b(3)). This interpretation of MCL §710.39 allows the State to circumvent neglect proceedings and terminate parental rights on the theory that an unknowing or "neutral" father is less deserving of the right to parent that a father who neglects or abuses his child.

The Constitution provides, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, §1. The right to conceive and to raise one's child is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 US 645, 651; 92 S Ct

1208, 1212 (1972); *Troxel v. Granville*, 530 US 57; 120 S Ct 2054, 2060 (2000). As a fundamental liberty interest, any law abridging the right to parent is subject to strict scrutiny. *Troxel v. Granville*, 120 S Ct 2054, 2060. That is, the "Fourteenth Amendment forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 US 702, 721; 117 S Ct 2258 (1997).

The Michigan Court of Appeals professed to engage in statutory interpretation of MCL §710.39 that followed the rule that, "[w]hen construing a statute, the court must use common sense and should construe the statute to avoid unreasonable consequences." *In the matter of RFF, Minor*, 2000 WL 1206039; ___ Mich App ___. However, in interpreting MCL §710.39, the Court of Appeals held the following:

> Accordingly, we disagree with appellant that the statute was amended in order to address the

situation presented in this case.

We believe the trial court properly found that appellant's rights should be determined under subsection 39(1). In reaching this holding, we note that the trial court did consider the fact that appellant was deceived about the pregnancy, but found that it could not assume that if appellant had known of the pregnancy earlier, he would have supported the mother. We agree that the statute does not allow such an assumption to be made. We also note that once appellant knew that he was the father and that RFF had been born, he did not provide support or care to the baby. Although appellant argues that he made an effort to be involved and decide what was best for the child, this does not constitute substantial and regular support or care for the purposes of subsection 39(2). See *Dawson, supra* at 695

(filing a notice of intent to claim paternity does not constitute support or care under subsection 39(2).)

While we believe that the statute requires the result we have reached in this case, we repeat the concern expressed by this Court in *Dawson, supra* at 695-696. We believe that the Legislature should reexamine §39 and evaluate whether it is appropriate to place a father who has been deceived about a pregnancy in subsection 39(1) or subsection 39(2) or whether it is appropriate to create a third subsection to address this specific problem. While this Court may feel that it is unfair to consider such a father under subsection 39(1), the Legislature is the appropriate forum for making these types of policy choices. *In the matter of RFF, Minor*, 2000 WL 1206039; ___ Mich App ___.

This interpretation created a statutory presumption in MCL §710.39 for all future Michigan courts to follow. The presumption is that a father who does not know about a pregnancy until it is too late to satisfy the requirements of MCL §710.39(2) (hereinafter referred to as a "neutral father") would not have provided substantial and regular support or care in accordance with his ability to provide such support or care had he known about the pregnancy in time to act. Thus, the neutral father must be judged under MCL §710.39(1), a category of fathers commonly referred to as "do-nothing fathers," whose parental rights are determined according to a judge's rendition of the best interests of the child.

To withstand the strict constitutional scrutiny of substantive due process, this infringement upon the fundamental right to parent must be narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 US 702, 721. Once Petitioner demonstrates the infringement of a fundamental liberty, the burden is on the State to show that

the infringement is narrowly tailored to serve a compelling state interest.

The proffered state interest of Michigan's adoption code is at MCL §710.21a; MSA §27.3178(555.21a)[a]. In this case, where a natural father presents himself to the court requesting custody of his child, the court does not find the father unfit, and the father demonstrates that he has the ability to provide food, clothing, shelter and medical care for the child, the State cannot show that a compelling state interest is met by the application of the best interests test in addition to the test of "the court (inquiring) into his fitness and his ability to properly care for the child. . . ." MCL §710.39(1). Indeed, by separating a child from its fit father, the State only spites its own goal "[t]o provide that each adoptee in this state who needs adoption services receives those services", MCL §710.21a(a), because it creates adoptees where they need not be created, thus taking adoption services away from those adoptees who truly need the services. The Michigan Supreme

Court recognized this when it stated:

> We recognize the long-established rule that the best interest of the child is of paramount importance, ... and that it is our judicial duty to safeguard his welfare and care.... However, we never have interpreted such rule so as to deprive a parent of the custody of his or her child, unless it was shown that the parent was an unsuitable person to have such custody." *In re Clausen*, 442 Mich. 648, 688, 502 NW2d 649 (1993), *quoting Liebert v. Derse*, 309 Mich. 495, 504; 15 NW2d 720 (1944).

Therefore, when Petitioner presented himself as a neutral father to the court who was ready, willing and able to care for his son, and the Michigan courts all interpreted him as a do-nothing father and applied MCL §710.39(1)'s best interest test to terminate his parental rights, Petitioner's substantive due process rights were violated. The only reason for this State

action is a desire to speedily make a child available for adoption. As such, the same rationale that struck the state statute in *Stanley v. Illinois* applies here, that is:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized

> determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 US 645, 656-657.

Thus, MCL §710.39 should be found unconstitutional and Petitioner's parental rights should be reinstated.

II. Does the application of MCL §710.39(2) to deceived or unknowing fathers violate the Equal Protection Clause of the U.S. Constitution when the deceived or unknowing father is prohibited from providing support or care and forced to have his parental rights determined solely on the basis of a judge's rendition of the best interests of the child, but a similarly situated father who was not deceived or unknowing would have an opportunity to provide support or care and have his parental rights terminated only upon a showing of abuse or

neglect?

The interpretation of MCL §710.39 by Michigan courts violates the Equal Protection Clause of the U.S. Constitution for the non-suspect class of fathers in adoption by abridging the fundamental right to parent of one set of fathers in adoption, but not abridging this fundamental right for the other set of fathers. This is a situation in which the fundamental rights strand of the Equal Protection Clause applies to enforce a review of this law under strict scrutiny. *Skinner v. Oklahoma*, 316 US 535, 541; 62 S Ct 1110 (1942).

The Constitution provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The right to conceive and to raise one's child is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 US 645, 651; *Troxel v. Granville*, 120 S Ct 2054, 2060. As a fundamental liberty interest, any law abridging the right to parent is subject to strict scrutiny. *Troxel*

v. Granville, 120 S Ct 2054, 2060. That is, the "Fourteenth Amendment forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 US 702, 721.

Deceived fathers, like the Petitioner in this case, or fathers who do not know about the mother's pregnancy, such as a father who is a millionaire and intends to marry his girl friend and start a family with her who does not know he is a father during the course of his girl friend's pregnancy because he went into a coma before she told him she was pregnant, but who wakes up upon the birth of his child to be served with notice of a hearing to terminate his parental rights because the girl friend placed the child for adoption while he was comatose, are denied equal protection of their parental rights under MCL §710.39 when compared with fathers in adoptions who know about the pregnancy and have the opportunity to

provide the support and care required by the statute. The deceived or unknowing fathers are deemed to not have provided the requisite support or care regardless of why they did not provide support or care. *In re RFF, a Minor*, unpublished opinion per curiam of the Michigan Supreme Court, decided October 24, 2000 (Docket No. 117555 & (42)); *In re RFF, a Minor*, 2000 WL 1206039; _____ Mich. App. _____. These fathers are therefore terminated according to the "do-nothing" father standard of MCL §710.39(1) when they appear at the termination hearing and request custody of the child because they did not provide substantial and regular support or care under MCL §710.39(2). This all happens regardless of the language in MCL §710.39(2) that states that the substantial and regular support or care is "*in accordance with the putative father's ability to provide such support or care . . . .*" (Emphasis added). In these example there is no connection, logical or otherwise, between the fact proved and the ultimate fact presumed. The fact proved is that the father ***did*** provide

substantial and regular support or care *in accordance with the putative father's ability to provide such support or care*. The unknowing father was in a coma and, through no fault of his own, did not know about the pregnancy and was not able to do anything. In this case of the deceived father, once Petitioner learned of the pregnancy, he did everything he could. As a result of the mother's lies, Petitioner had no reason to believe that she was pregnant until April 14, 1999, less than a month before the baby was born. Upon being informed of the pregnancy, Petitioner did everything he could do at that point in time, particularly in light of the fact that Respondent had already begun adoption proceedings. Petitioner made various contacts with the agency, reviewed the paperwork provided to him, and seriously considered the possibility of adoption. Addressing this circumstance in his life, very seriously and responsibly, he reviewed the options presented to him in the short period of time available and made every effort to do what he was supposed to do. He made an effort to be involved and

to decide what alternatives were best for the child. He did this in the face of the agency telling him that he would be a good parent and would have a good opportunity to obtain custody of the child should he desire to do so. Once he concluded that he wanted to be a parent to his child, he then faced an agency telling him that a lawyer was simply a waste of money and this matter could be resolved without legal intervention. All the while, the agency was setting him up for the hearing to terminate parental rights and not assisting him with guidance or any idea of how to assert his parental rights, despite telling him that agency services included advice about "birthparent rights and choices." *The agency went so far as to tell him, when he asked about paying for hospitalization expenses, that his financial responsibilities were taken care of at this time by the prospective adoptive parents, completely misleading him in a primary area that the court would examine when deciding how to determine his parental rights.* Meanwhile, the biological mother proceeded to give birth to the child without even notifying

Petitioner of this event. The actions of the mother in denying the pregnancy and orchestrating the adoption before the biological father was involved, coupled with the agency's actions, certainly precluded Petitioner's ability to provide support or care.

Both the deceived and unknowing fathers are "neutral fathers." However, the fact presumed is that, had these neutral father known about the pregnancy, they would not have provided substantial and regular support or care, regardless of any other surrounding facts. Therefore, their rights are terminated under the best interests of the child test in MCL §710.39(1). This is compared to fathers who know about the pregnancy and are thus able to provide the requisite support or care. With the opportunity to provide such support or care and so providing it, the class of fathers who know about the pregnancy are not terminated unless they neglect or abuse the child according to MCL §712A.19b. In terms desire and action had the chance presented itself, the actions of deceived or

unknowing fathers and knowing fathers that provide support or care would be the same. Both groups would provide support or care for the mother and child before the termination hearing. Only when it comes to knowledge that is outside of the control of the deceived or unknowing fathers are the pains and penalties of the law different. The Equal Protection Clause is meaningless if such senseless lines are permissively drawn.

Moreover, the State cannot show that a compelling state interest is met by the application of the best interests test in addition to the test of "the court (inquiring) into his fitness and his ability to properly care for the child. . . ." MCL §710.39(1). Separating a child from its fit father only because the father did not know about the pregnancy and thus could not act, defeats the State goal of providing for a child *in need* of adoption. MCL §710.21a. Once again, the State creates adoptees where they need not be created, thus taking adoption services away from those adoptees who truly need the services. Thus, MCL §710.39 should be found unconstitutional and Petitioner's

parental rights should be reinstated.

III. Does MCL §710.39 violate Petitioner's substantive due process rights because it fails to accord the constitutionally required deference to fit fathers who were deceived?

The Constitution provides, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, §1. The right to conceive and to raise one's child is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 US 645, 651; *Troxel v. Granville*, 120 S Ct 2054, 2060. As a fundamental liberty interest, any law abridging the right to parent is subject to strict scrutiny. *Troxel v. Granville, supra*. That is, the "Fourteenth Amendment forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 US 702, 721. This court held there is a legal presumption that fit

parents act in their child's best interests. *Parham v. J.R.*, 442 US 584, 602; 99 S. Ct. 2493 (1979). This court reaffirmed the proposition when it held, "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. *Troxel* at 2061. Justice Souter seconded this premise in his concurring opinion at footnote 2. *Troxel* at 2066 (Souter, J., concurring opinion). Justice Thomas also upheld the premise that fit parents make decisions that are in the best interests of their children. *Troxel* at 2068 (Thomas, J., concurring opinion). Finally, *Troxel* held that the subject third-party visitation statute violated the parents due process rights based on its grant of "broad, unlimited power" to the trial court to substitute its judgment, based on only a best interests analysis, for that of fit parents. *Id.* at 2064. Justices Souter and Thomas joined the plurality's opinion in concurring

opinions that emphasized that a best interests test was not sufficient to grant third party visitation in the face of disagreement from fit parents. *Troxel v. Granville*, 120 S. Ct. 2054, 2065, 2067.

MCL §710.39 defines a "fit" parent as one who does not neglect or abuse his or her child. MCL §710.39(2). Specifically, MCL §710.39(2) does this by saying that a father's parental rights shall not be terminated "except by proceedings in accordance with section 51(6) of this chapter (MCL §710.51(6); MSA §27.8178(555.51)(6), step-parent adoption, not applicable to this case) or section 2 of chapter XIIA (MCL §712A.19b, termination for neglect or abuse)." By saying that a father will not be terminated if he provides support or care unless he is found to have neglected or abused the child according to MCL §712A.19b, the Michigan statute impliedly states that the father is fit unless he neglects or abuses the child since the legislature would not allow an unfit parent to maintain parental rights. Therefore, in the case at bar,

Petitioner is a fit parent. Moreover, no Michigan court stated otherwise.

In this case, MCL §710.39(1) subjects the very existence of a father's parental rights to a best interests of the child analysis without giving any deference to the fitness of the father, despite the first portion of the statute that requires the court to "inquire into his fitness and his ability to properly care for the child." MCL §710.39(1). The trial court can find the father to be fit under MCL §710.39(1), but still go on to terminate his parental rights under a best interests analysis, just as occurred here.

Troxel v. Granville's holding applies in this case to strike MCL §710.39(1). This Michigan statute does not significantly differ from the Washington statute because MCL §710.39(1) permits the abolition of parental rights and third party custody based upon the same best-interests test condemned in *Troxel*. As in *Troxel*, Petitioner is a fit parent who made a decision that is presumed to be in the best interests of his child, that is to

keep custody of the child and raise the child himself. However, despite his decision, the State intercedes once an adoption petition is filed to determine whether his custody is in the best interests of the child without any consideration to this fit father's decision. This flies in the face of this country's long-standing history and primary protection of the natural parent-child liberty interest that parental custody may not be disturbed absent a showing that the natural parent is unfit. *Stanley v. Illinois*, 405 US 645; *Smith v. Organization of Foster Families* , 431 US 816, 845; 97 S Ct 2094 (1977); *Meyer v. Nebraska*, 262 US 390, 399; 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Skinner v. Oklahoma*, 316 US 535. As *Troxel* so aptly stated:

> Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the

best decisions concerning the rearing of that parent's children. *Troxel v. Granville* at 2061 (O'Conner, J., plurality opinion).

MCL §710.39(1) strips fathers of the constitutionally firm, objective standard of testing their parental rights under a fitness standard. A fitness test is objective because it recognizes both the liberty and other interests attached to the natural parent-child relationship and the societal interests in preserving that relationship. Additionally, the fitness test places the focus where it should lay, on the parent and the basic ability to provide for the child. However, rather than use fitness, MCL §710.39(1) replaces it with the subjective and wide-ranging best interests test determined by a judge. This best interests test, at MCL §710.22(f); MSA §27.3178(555.22), is comprised of a number of subjective factors including assessing the love and emotional ties between the child and parent, the capacity of the parent to give affection, to provide food, clothing, and other staples of life, the moral, physical and

mental fitness of the parent and other factors the court may deem relevant. The State bursts on the scene and defines what it deems to be the perfect parent and forever removes the child from its natural parent if this perfection, depending on the particular judge's definition, is not met. This is appalling, and has repeatedly been forbidden by this Court. *Smith v. Organization of Foster Families* , 431 US 816, 863; *Troxel v. Granville* at 2061. As this Court held:

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter. *Smith*, 431 US 816, 862-863, *citing Prince v. Massachusetts*, 321 U.S. 158, 166; 64 S.Ct. 438

(1944).

Michigan impermissively violated Petitioner's substantive due process rights by forcing the breakup of natural parent and child over the objections of the fit parent and by applying the best interests of the child test alone to terminate his parental rights. Additionally, the State continues to defeat its own goal to provide for adoptees *who need adoption*, MCL §710.21a, by creating adoptees where they need not be created, thus taking adoption services away from those adoptees who truly need the services. Therefore, MCL §710.39(1) should be struck as unconstitutional and Petitioner's parental rights should be reinstated.

Respectfully submitted,

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APPENDIX

I. ***In the Matter of RFF*, Bay County Circuit Court, Family Division, decided August 3, 1999 (Docket No. 99-4496-AD), written opinion:**

STATE OF MICHIGAN
IN THE 18th CIRCUIT COURT FOR BAY COUNTY
FAMILY DIVISION

In the matter of:
RYAN FRANCIS FREED, DOB 5-9-99 99-4496-AD
Adoptee

OPINION

On June 25, 1999 this court heard testimony to identify the father of the above listed child, and determined from the birth mother's testimony that Luke Frisbey is the father of this child. The mother, with the assistance of Child & Family Service of Midland, had tried to arrange a direct placement adoption. Mr. Frisbey appeared in court with counsel and responded to the adoption petition by seeking custody of his baby.

It was therefore necessary to determine which section of MCL 710.39 applies to this father. The statute sets up two categories of putative fathers, and. defines the procedure for terminating rights or awarding custody based on the putative father's relationship with mother/child during pregnancy and after birth. A "section 2" father who has provided regular and substantial support may not have his parental rights involuntarily terminated except under the provisions of MCL 710.51(6) (commonly referred to as the "2 year no pay, no see" statute) or under the Child Protection Act.

After hearing the testimony of the birth mother and birth

father, the court concluded that Luke Frisbey is a "section 1" father. The facts were uncontested. Luke Frisbey had contributed no support whatsoever during the mother's pregnancy or at any time after the child's birth. He had not established any sort of custodial relationship. The parties had broken up before knowing of the pregnancy, and had almost no contact with one another until one month before the birth. Through his attorney, the birth father attempted to show -that he was a "section I" father, only because of the mother's actions which thwarted his attempts to find out the truth about her pregnancy.

The court placed its findings on the record, and alluded to Baby Girl Dawson, No. 210641, Court of Appeals, dated November 24, 1998. This case recognized the inherent unfairness created by a statute which does not address a category of father who was lied to or thwarted by the mother. However, the court of appeals concluded that "because 710.39, as written, does not account for such a situation, we must conclude in the instant case that respondent did not satisfy 710.39(2)." This court reached the same conclusion, and found that in the case of birth father Luke Frisbey, his parental rights may only be terminated pursuant to MCL 710.39(1), by the court inquiring into his fitness and applying the best interests standards.

The hearing continued, with the court evaluating, testimony pursuant to MCL 710.22(f). This statute outlines the best interest factors to be considered, to give the adoptee permanence at the earliest possible date. During this phase of the hearing the court heard again from Luke Frisbey, and then from his parents, his aunt, his family minister, and his dentist. The court will briefly summarize this testimony before making its findings.

SUMMARY OF TESTIMONY

The family dentist, Dr. Martha Bamfield, testified as to the wholesomeness of the Frisbey family. She hired Luke's mother as the day care provider for her young child. This person had no close personal knowledge of Luke except to describe him as "a typical 17 year old boy." She could not comment on his ability to parent, except in the context of the senior Frisbey's having primary care of the baby.

Likewise the minister, Brian Wickes, testified on behalf of Mr. and Mrs. Gary and Becky Frisbey. He has been their pastor for many years and indicated they seldom need his pastoral tending because they are seldom in distress. He knows Luke and indicated Luke no longer attends church, which he commented is not unusual, given his age. He could not comment on Luke's parenting abilities, 'except to say that he is an "average teenager" and his parents would take "good care" of a baby.

The court also heard from Dawn Wetzel, Luke's aunt. She testified as to the closeness of the extended family, and stated that there is a vast support network of Frisbey's living within a radius of Luke's parent's home. She wanted the court to know that Luke and his mother would have much support in raising this baby. She also testified that Luke is a responsible young man who cut her 7-acre lawn for two summers, and treats his younger cousins well.

Luke Frisbey, age 17, testified that he had originally intended to agree with the adoption plan. He told this to the birth mother the first time she finally confirmed her pregnancy. When his former girlfriend mentioned the adoption idea, she told Luke she intended to go to college and wanted to give the baby up for adoption. Luke agreed that he had his own plans for the future which entailed joining the Marines, and therefore

would probably sign the adoption papers. Luke further testified that he later discussed the matter at length with his parents. His parents went to the Agency without him, to gather information. His mother then took him to the Agency to speak with the pregnancy/adoption counselor and to sign papers. On that visit, Luke learned that the baby had been born the day before and was a boy. He described this news as having a very emotional affect on him. He broke down and cried. He wanted to see the baby before making a decision. This was arranged. He recounted how he held Ryan, fed him, and, like all new parents, checked his fingers and toes. He decided that he could not sign off on his parental rights.

Luke was questioned about his plan for custody. He admitted that the plan is for his mother to be primary custodian while he finishes high school and gets himself settled into a job. He will work every day after school to help his parents defray the costs of raising the baby. He cannot supply medical insurance but his Parents can. He will be out of the home from approximately 7:30 a.m. to 7:00 p.m. during the week and will rely on his mother to provide full time child care. He believes he will take over baby chores at night, and use study hall time at school to do his homework. Luke could not tell the court his Grade Point Average. He plans to curtail all social activities and will not date or play sports. He will not enter the Marines as planned, but instead will stay in the community and try to find a ob. Luke admitted that he is still in need of parenting, himself, commenting that my parents "are not done raising me yet."

Luke's parents both testified in support of his decision to seek custody. They indicated they would have supported him in either decision, adoption or custody. They spoke with him at length about his options, and asked him if he could “live with himself” knowing a stranger was raising his first born son. They indicated they can afford to financially support this baby and that they have successfully raised other children. They

avowed that "children are our life" and are highly valued within the Frisbey family. They had looked into the insurance issue and discovered that if Luke left their household they could keep the baby and maintain medical insurance by adding a rider to their current policy. Both parents acknowledged that Luke is still young and not ready for full time parenting respqnsibility, and they will be in charge until he is ready.

ANALYSIS OF CHILD CUSTODY FACTORS

The court is required to evaluate the custody request under MCL 710.22 (f), which reads:

"Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated., and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee, or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.

The court finds that there. is theoretical affection between the putative father and child; they have had no contact other than one brief meeting, and therefore no true emotional ties exist other than the father's expressed desire to raise the child because he feels the child "would not want to know his parents gave him up", and because he feels a sense of moral obligation to make amends and take responsibility for his part in this unplanned pregnancy.

(ii) The capacity and disposition of the adopting individual or individual or individuals, or, in the case of a hearing under section 39, the putative father, to give the

adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

The birth father has the capacity to.give love and affection as a big brother would; he could not express what type of guidance he would give a child, other than to say he is not ready yet because he is still being raised by his own parents. The birth father could not identify the religion he was raised in, nor verbalize what type of religion he would raise the child in, but would leave that to his parents. He is of the same race as the child and would raise the child with a large extended family on his father's side.

(iii) The capacity and disposition of the adopting individuals, or, in the case of a hearing under section 39, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

Luke Frisbey cannot provide these things on his own. He is still in high school and works a low skill/low pay job. His plan is to work to subsidize his parent's expenditures on behalf of the baby. He will not have full capacity on his own to provide the necessities of life until he is out of high school and established on his own, which he admits may take several years. His parents can provide these things. They cannot provide for permanency, because the plan is for the grandparents to raise this baby until a time when the family agrees Luke is ready for custody. The child will experience a disruption in his life when he is moved from the grandparents home to its father's home, perhaps several years away.

(iv) The length of time the adoptee has lived in a stable, satisfactory environment and the desirability of

maintaining continuity.

The factor does not apply to the case at hand. The infant has lived in the prospective adoptive home since birth, but that has been approximately 9-10 weeks as of the date of this opinion. The court believes that a move to another home at this early date would not be significantly disruptive, given the age of the child.

(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39, the home of the putative father.

The grandparents home is permanent to themselves. It is permanent to the putative father for a least one more year. His plans after graduation are uncertain. He may decide to move out and leave the child with his parents; his parents have already contemplated that they may keep the baby if Luke moves out; but the permanence of the 17 (now 18) year old father's residence is unknown at this time.

(vi) The moral fitness of the adopting individuals, or, in the case of a hearing under section 39, the putative father.

Morality was not a factor in this hearing

(vii) The mental and physical health of the adopting individuals, or, in the case of a hearing under section 39, of the putative father, and of the adoptee.

From all accounts the putative father and the adoptee are in good physical health. The mental health, or perhaps the maturity, of the putative father was called into question during testimony. The putative father admitted to a strong temper, a tendency toward tantrums, some violent outbursts, one leading to his suspension from school, and a false suicide threat to the

mother of the baby

(viii) The home, school, and community record of the adoptee.

This was not a factor due to the baby's age.

(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and the court considers the adoptee to be of sufficient age to express a preference.

This factor was not considered due to the child's infancy.

(x) The ability and willingness of the adopting individuals to adopt the adoptee's siblings.

This was not a factor as there are no siblings.

(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

The most significant factor in this case is weighing the father's custody plan. It is, in . effect, a plan to award custody to third party grandparents. The court cannot find fault with the proposed custodial home, except that Luke will not be the primary custodian. He asks to be custodian in name, but in reality he seeks to obtain custody for his parents.

The court does not believe the intent of the statute permits us to award custody to third parties. After analyzing the factors above, the court finds that it is not in the best interests of the minor child to award custody to the father, when the actual plan is for grandparent custody.

The court is aware that by reaching this conclusion, it appears that we are favoring a birth mother who lied, and an adoption agency which poorly handled the pre-adoption matters.

The parties live in a small town. They were high school friends whose romance was rocky from the start. When they broke up, there was no further communication, even when Brandy discovered she was pregnant. She and her parents made the adoption arrangements without notifying Luke or giving him any time to reach a satisfactory conclusion on his own. This young man was faced with final verification of the pregnancy just four weeks before the birth. He was not notified of the birth until he happened into the Agency on the day after it occurred. He admitted to feelings of anger, and so did his mother, at not being let in on the news in some formal way. He denies these feelings had anything to do with his decision to seek custody.

Yet, it is clear that Luke Frisbey himself is not ready for custody. He has no clear plan for his life. He clearly is not ready for parenthood in any real sense, and he admits this. He searched for some way to allow the burden to pass, by disputing the birth mother's time frame regarding their sexual contact, and by seeking biological verification of paternity before the court made its final ruling.

The court is faced with the overwhelming impression that Luke is seeking custody to satisfy his parents and fulfill a sense of duty toward them. Luke did not express love or affection for the child; he expressed a sense of obligation. "I need to take responsibility for my actions". When asked what plans he had to raise the child in a religion or creed, Luke could not answer. He knew the name of his former church but not the denomination. He could not identify it as Christian or outline any of its major tenets. He could not articulate any of his own beliefs, and repeated that his values are “don't give up what's

mine" and "be responsible for my actions."

Luke's immaturity was revealed in other ways. He admitted that he has a temper. Almost every witness mentioned his temper and then downplayed it as being "normal boy stuff'. His mother allowed that "we have our moments" but "the lines of communication are still open." Luke admitted that he had been kicked out of school recently for fighting; that he had punched lockers in a fit of anger; that he had given himself a black eye while fighting with the birth mother; and that he had threatened suicide to her during one of their fights. He claimed he didn't mean it and he testified that he often says things in anger that he does not mean.

He did not reveal any sense of joy or elation in seeking custody, but indicated a sense that this is his punishment for being irresponsible. He will have to give up the life of a teenager, and his cherished plans to enter the Marine Corps, in order to fulfill his moral obligation to keep the child within the extended Frisbey family.

The court considered case law which states that a person's age in and of itself is not a factor; but that maturity is a factor. In the matter of Baby Boy Barlow, 404 Mich 216, (1978). Parental assistance for child care is acceptable, but total reliance on grandparents to the extent that the putative father abdicates his care of the child to third parties, is not appropriate, In Re Ballard, 219 Mich App 329, (1996).

This court conclude's that the custodial arrangement is this case exceeds the bounds of the statute in that grandparents will be the primary custodians of the minor child until the putative father is graduated from high school, gainfully employed, and deemed by his own parents to be ready for custody. All interested parties concurred that this process could take years. This arrangement does not provide the permanency

contemplated by the adoption statute. When viewed independently of his parents, the factors do not favor awarding custody of an infant to Luke Frisbey. Since it is not in the best interests of the child to award custody to the father, the parental rights of Luke Frisbey shall be terminated.

/s/ July 22, 1999
Karen A. Tighe
Judge of Circuit Court Family Division

II ***In the Matter of RFF*, Bay County Circuit Court, Family Division, decided August 3, 1999 (Docket No. 99-4496-AD), written order:**

STATE OF MICHIGAN
JUDICIAL CIRCUIT
FAMILY DIVISION
BAY COUNTY

FILE NO. 99-4496-AD
ORDER TERMINATING RIGHTS OF FATHER WITHOUT RELEASE OR CONSENT

In the matter of Ryan Francis Freed (Full name of child), May 9. 1999 (Date of birth), adoptee

1. Date of hearing: June 25, 1999 Judge: Karen A. Tighe

2. A petition has been filed to determine the identity of the father and to determine or terminate his parental rights to the above named child, born out of wedlock on May 9, 1999 to Brandy Jo Freed

X who has executed or proposes to execute a release or consent relinquishing her parental rights to the child.

___ who has joined with her husband in a petition for adoption.

3. Notice of this hearing has been given or waived as required

by law.

4. The court has received evidence as to the identity and whereabouts of the father.

THE COURT FINDS that: (If identity of father is known, check 5. If father is not known, check 7.)

X 5. The father of the child, born out of wedlock is Luke A. Frisbey.

He: (check one)

___ a. submitted a verified affirmation of his paternity and a denial of his interest in custody of the child.

___ b. filed a disclaimer of paternity.

___ c. was served with a notice of intent to release or consent at least 30 days before the expected date of confinement specified in that notice but,failed to file an intent to claim paternity either before the expected date of confinement or before the birth of the child.

___ d. was given proper notice of this hearing and:
failed to appear.
___ appeared and denied his
___ interest in the custody of the child.

___ e. cannot be located after reasonable effort was made. He has not provided support for the mother, has not shown any interest in the child, and has not made provision for the child's care for at least 90 days preceding this hearing.

X f. appeared and requested custody of the child. The father has not established any custodial

relationship with the child or did not provide any support or care for the mother during pregnancy or for either mother or child after the child's birth. The court inquired into the fitness and the ability of the father to properly care for the child. It would not be in the best interest of the*child to grant custodv to the father.

____6. The mother was married to _____ for part or all of the time from the conception to the date of birth of the child. He is not the father of the child.

____7. The identity of the father cannot be determined after reasonable effort was made. He has not made provision for the child's care and did not provide support for the mother during her pregnancy or during her confinement.

IT IS ORDERED that the parental rights of Luke Frisbey are terminated.

AUG 3, 1999 /s/
Date Judge Karen A. Tighe

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PCA 312 (9/97) ORDER TERMINATING RIGHTS OF FATHER WITHOUT RELEASE OR CONSENT
MCL 710.36; MSA 27.3178(555.36)

III. ***In re RFF, a Minor***, 2000 WL 1206039, _____ Mich. App. _____; ____ NW2d _____ (2000):

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of RFF, Minor.

LAF,

FOR PUBLICATION
August 15, 2000
9 :15 a.m.

Appellant,

v

BJF,

Appellee.

No. 221581
Bay Circuit Court
Family Division
LC No. 99-004496-AD

Before: Wilder, P.J., and McDonald and Doctoroff, JJ

MCDONALD, J.

Appellant,,LAF, appeals as of right the trial court's order terminating his parental rights to his son, RFF, pursuant to § 39 of the Adoption Code, MCL 710.39; MSA.27.3178(555.39). We affirm.

This case is troubling. We set forth the complete factual context to emphasize the numerous issues we believe the Legislature should consider in examining the statute at issue.

The child involved in this case was conceived out of wedlock while the parties were in high school. The parties dated for approximately a year, beginning in the fall of 1997. Their dating relationship ended in September 1998. According to appellant, in November 1998 appellee, BJF, told him that she had missed a menstrual period. Appellee recalled this disclosure being made in January 1999. In any event, appellee admits that she lied to appellant several times when he confronted her about rumors at school that she was pregnant. She adamantly denied that she was pregnant several times. However, on April 14, 1999, appellee telephoned appellant and told him that she was pregnant, that he was the father, and that she planned to put the baby up for adoption through an adoption agency. Appellee was planning to attend college in the fall. Appellant indicated. that he had plans to enter the

Marine Corps and wanted to complete boot camp that summer. Appellant appeared to be in agreement with the adoption plan at that time. Appellee told appellant that he would be receiving paperwork from the adoption agency. She telephoned him again about two weeks later to find out whether he had received the paperwork. They again discussed her plans for college and his plans for boot camp. As far as appellee knew, appellant was still in agreement with the adoption plan. They had not spoken directly since that second telephone conversation.

RFF was born May 9, 1999 and was immediately turned over to the prospective adoptive parents.' Appellant was not informed about the birth at that time. He claimed that he did not know when the baby was due.

Appellant and his mother went to the adoption agency the day after the baby was born. They were going to the agency with plans for appellant to sign the papers necessary to consent to the adoption. However, when appellant learned that the baby had been born the previous day, he became upset and changed his decision. Appellant refused to sign the consent and he and his mother left the agency. A few days later appellant contacted the adoption agency and arranged another meeting. At the meeting, he told the agency worker that he wanted to see the baby. Appellant was able to see RFF once when he was eight days old. This confirmed appellant's desire to keep his son. Appellant informed the agency that he wanted to keep RFF. He testified that up until that point he felt that the adoption agency worker was going to assist him in getting custody of RFF. Appellant claimed that the agency worker told him that he had a good chance of getting to keep the baby and that they did not need to get a lawyer. He also testified that he was told cost was not an, issue because the prospective adoptive parents were paying all the bills. However, appellant testified that when he told the worker that he wanted to keep

RFF, her demeanor changed. She talked about the trauma to RFF if removed from the prospective adoptive parents and the bonding among the baby and the prospective adoptive parents. At that point, RFF was only about ten days old. Appellant then stopped dealing with the agency. Appellant admitted that he did not send any support money to appellee before or after the baby was born.

On June 25, 1999, the trial court held a hearing on the petition to identify the father and determine or terminate his rights. After determining that appellant was the father of the child,[2] the trial court found that appellant had not provided "substantial and regular support or care" for the purposes of subsection 39(2) of the Adoption Code.[3] The trial court acknowledged that appellee may have thwarted appellant's participation in the pregnancy and that the adoption agency could have given him better counseling, but concluded that for whatever reason, appellant had not provided support or care and did not fall under subsection 39(2). Accordingly, the trial court continued the hearing to determine whether the best interests of the child would be served by granting custody to appellant or whether appellant's parental rights should be terminated pursuant to subsection 39(l). In a written opinion issued approximately a month after the hearing, the trial

[1]This case involves a direct placement adoption in which appellee placed the child with a specific couple.

[2]Later, DNA testing confirmed the trial court's determination at the hearing. There was some discussion of whether to adjourn the hearing for the

testing to take place, but the trial court reserved its ruling and continued the hearing.

[3] MCL 710.39(2); MSA 27.3178(555.39)(2).

court analyzed on the best interest factors and found that it was not in the best interest of RFF to award custody to appellant. Accordingly, the trial court entered an order terminating appellant's parental rights.

Appellant first argues the trial court erred in applying subsection 39(l) rather than subsection 39(2) of the Adoption Code. This is a question of law, which we review de novo. *In re Lang,* 236 Mich App 129, 135-136; 600 NW2d 646 (1999).

MCL 710.39; MSA 27.3178(555.39) provides, in pertinent part:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
>
> (2) If the putative father has established a custodial relationship with the child or has provided *substantial and regular* support or care *in accordance with the putative father's ability to*

> *provide such support or care* for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA. [Emphasis added to reflect amendment effective September 1, 1998.]

As the Court explained in *In re Barlow,* 404 Mich 216, 229; 273 NW2d 35 (1978):

> Section 39 of the code creates 'two categories of putative fathers and provides different standards for termination of the rights of each. Putative fathers who have established no custodial relationship with the child, and who have provided no support for the mother or child prior to the notice of hearing, may have their parental rights terminated if the court finds, after examining the father's fitness and ability to properly care for the child, "that it would not be in the best interests of the child to grant custody" to him. The parental rights of the second group, those who have established some kind of custodial or support relationship prior to the notice of hearing, are subject to termination only by proceedings under the general jurisdictional provisions of chapter 12A of the Probate Code.

In this case, it is undisputed that appellant has not established a custodial relationship with RFF. It is also undisputed that appellant did not provide any support or care to appellee during her pregnancy or after RFF's birth. Appellant further admits that he has not provided any support or care to

RFF since his birth. However, appellant argues that because of the unique circumstances of this case, he should be considered to come within the provisions of subsection 39(2). Specifically, appellant points to appellee's concealment of her pregnancy until less than a month before RFF's birth as the reason why he could not provide support or care during the. pregnancy. In addition, appellant argues that the adoption agency misled him after the child was born by assuring him that the costs were being paid by the prospective adoptive parents, further thwarting his ability to have his rights considered under subsection 39(2).

This Court has previously considered the issue whether the father's rights should be determined under subsection 39(2) where a mother thwarts his participation in the pregnancy in *In re Dawson,* 232 Mich App 690; 591 NW2d 433 (1998). In *Dawson,* the mother told the father she planned to have an abortion, later told him he was not the child's father, and then did not inform him the child was born. *Id* at 692, 695. This Court held that "because § 39, as written, does not account for such a situation, we must conclude in the instant case that [the father] did not satisfy subsection 39(2)." *Id.* at 696. Accordingly, this Court held the father's rights were properly determined under subsection 39(l). *Id.* at 695.

However, the Legislature amended subsection 39(2) effective September 1, 1998, and in *Dawson*, this Court was interpreting the previous version of the statute. At the time this Court decided *Dawson,* subsection 39(2) provided:

If the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with

section 51(6) of this chapter or section 2 of chapter)XIIA. [*Dawson, supra* at 693-694.]

The amended statute provides that to come within subsection 39(2), a father must provide "*substantial and regular* support or care *in accordance with the putative father's ability to provide such support or care.*" MCL 710.39(2); MSA 27.3178(555.39)(2) (emphasis added).

Appellant argues the statute was amended to address the problem in this case. We disagree.

Statutory interpretation is a question of law that this Court reviews de novo. *In re Schnell,* 214 Mich App 304, 310; 543 NW2d 11 (1995). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins v Marlette Homes, Inc,* 456 Mich 511, 515; 573 NW2d 611 (1998), *Dawson, supra* at 696. The starting point for determining the Legislature's intent is the specific language, of the statute. *House Speaker v State Administrative Board,* 441 Mich 547, 567; 495 NW2d 539 (1993); *Dawson, supra* at 696. The Legislature is presumed to have intended the meaning it plainly expressed, and when the statutory language is clear and unambiguous, judicial construction is neither required nor permitted. *Rowell v Security Steel Processing Co,* 445 Mich 347, 353; 518 NW2d 409 (1994); *Dawson, supra* at 696. Where the language employed by the Legislature is susceptible to more than one interpretation, judicial construction is justified. *Rowell, supra* at 353. When construing a statute, the court must use common sense and should construe the statute to avoid unreasonable consequences. *Dawson, supra* at 696. Because the Adoption Code is in derogation of the common law, it must be strictly construed. *Id*

Appellant argues that the Legislature intended to

include fathers who have been deceived about a pregnancy under subsection 39(2) when it added the phrase "in accordance with the putative father's ability to provide such support or care" to the statute. This language does not clearly address the situation presented in this case. At best, the language may be susceptible to multiple meanings. The language could simply address a putative father's financial ability to provide substantial and regular support and care to the mother during pregnancy. The phrase might also be interpreted in a broader sense to encompass the situation in this case. However, even if we view the language as ambiguous, we do not believe the Legislature intended to create a deceived father exception to the requirement that a father provide substantial and regular care and support to the mother during pregnancy in order to come within subsection 39(2).

The legislative history reveals that the Legislature did not consider the situation presented in this case when it amended subsection 39(2). Instead, it appears the statute was amended to raise the amount of support required for a father to have his rights determined under subsection 39(2). The rationale for the amendment was identified as follows in the Senate Legislative Analysis, SB 115, August 26, 1998:

Some people believe that the standard of providing "support or care" is too low for a, putative father to receive a hearing on the termination of his parental rights because even a minimal amount of support or care could be used to justify not having parental rights terminated without a hearing. They contend that, to earn the right to a hearing on his parental rights, a putative father should have to provide "regular and substantial" support or care for the mother during pregnancy or for the mother or the child after the birth.

This sentiment is continued in the arguments supporting

the amendment to the bill. *Id.* The arguments opposing the amendment also reflect that the Legislature did not intend to create an exception where a father has been deceived about the pregnancy:

> While the bill's objective may be laudable, it raises concerns about the elimination of the due process rights of a person who made little or no effort to exercise his responsibility of support. The parental rights of such a person may be automatically terminated under the bill because a mother has decided to terminate her parental rights. *Sometimes, a father may not know in advance of a birth that he is about to become a parent.* [emphasis added.]

Accordingly, we disagree with appellant that the statute was amended in order to address the situation presented in this case.

We believe the trial court properly found that appellant's rights should be determined under subsection 39(l). In reaching this holding, we note that the trial court did consider the fact that appellant was deceived about the pregnancy, but found that it could not assume that if appellant had known of the pregnancy earlier, he would have supported the mother. We agree that the statute does not allow such an assumption to be made. We also note that once appellant knew that he was the father and that RFF had been born, he did not provide support or care to the baby. Although appellant argues that he made an effort to be involved and decide what was best for the child, this does not constitute substantial and regular support or care for the purposes of subsection 39(2). See. *Dawson, supra* at 695 (filing a notice of intent to claim paternity does not constitute support or care under subsection 39(2).)

While we believe that the statute requires the result we have reached in this case, we repeat the concern expressed by

this Court in *Dawson, supra* at 695-696. We believe that the Legislature should reexamine § 39 and evaluate whether it is appropriate to place a father who has been deceived about a pregnancy in subsection 39(l) or subsection 39(2) or whether it is appropriate to create a third subsection to address this specific problem. While this Court may feel that it is unfair to consider such a father under subsection 39(l), the Legislature is the appropriate forum for making these types of policy choices.

Next, appellant argues the trial court erred in finding that it was in the best interest of RFF to terminate his parental rights. This Court reviews the trial court's findings of fact for clear error. *In re Cornet*, 422 Mich 274, 277; 373 NW2d 536 (1985); *Lang, supra* at 139.

After hearing testimony on this issue, the trial court made findings on the relevant factors set forth in MCL 710.22(f); MSA 27.3178(555.22)(f).[4]

Under factor (i), the trial court found there were no true emotional ties between appellant and RFF in light of the fact that they only had one brief meeting. The trial court also noted that appellant had not expressed love for the child during his testimony and indicated he wanted to keep the child because of feelings of responsibility and obligation.

Factor (ii) addresses the capacity of the putative father to give the child "love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture" of the child. MCL 710.22(f)(ii); MSA 27.3178(555.22)(f)(ii). Under this factor, the trial court stated

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[4]The trial court found that factors (iv), (vi), (viii), (ix), and (x) were not relevant in this matter.

that appellant had the capacity to give love and affection as a big brother would and emphasized appellant's inability to express the type of guidance he would give to the child. The trial court also found appellant could not identify the religion he was raised in or explain in what religion he, would raise RFF. Moreover, the trial court recognized that appellant would raise the child in his large extended family.

Factor (iii) assesses the putative father's capacity and disposition to provide the child with "food, clothing, education, permanence, medical care ... , and other material needs." MCL 710.22(f)(iii); MSA 27.3178(555.22)(f)(iii). The trial court found that appellant could not provide these things on his own because he was still in high school and worked at a low-paying job. Appellant's parents could provide these material things, but could not provide permanence because appellant eventually planned to move out of his parents' home once he was established.

Regarding factor (vii), the trial court found that appellant and the baby were in good physical health, but that the appellant's maturity was in question. The trial court considered appellant's admissions that he had a temper, that he had threatened suicide after arguing with the child's mother, that he had punched lockers at school, and that he had been suspended from school once after fighting with another child.

The trial court relied heavily on its lengthy findings under factor (xi), "any other factor considered by the court to be relevant." Under this factor, the trial court emphasized that appellant's custody plan was in effect a plan to award custody to his parents and that he would not be the primary custodian of the child. The trial court indicated it had an "overwhelming impression" that appellant was "seeking custody to satisfy his parents and fulfill a sense of duty toward them." In addition, the trial court discussed appellant's immaturity and his lack of

"any sense of joy or elation in seeking custody."

Upon considering all of the relevant factors, the trial court found that it was not in the best interest of the child to award custody to appellant. The trial court indicated that the arrangement of allowing the grandparents to be primary custodians until appellant was ready to assume the responsibility did not provide permanency and that if appellant was viewed independently of his parents, the factors did not favor awarding him custody of the baby.

While we disagree with some of the trial court's findings we are not left with a definite and firm conviction that the trial court made a mistake. Accordingly, we find no clear error on this record. *Overall v Overall*, 203 Mich App 450, 454; 512 NW2d 851 (1994). The facts of this case are substantially different than those of *In re Barlow, supra,* which appellant cites in support of his position. There, although the appellant was young and unmarried, the record in that case did not "disclose the kind of lack of maturity that would support a finding that [the] appellant [was] unable to properly care for his child." *Id* at 23 1. The appellant in *Barlow* had finished school, was working full time, and had his own house. Moreover, appellant's reliance on *Ireland v Smith,* 451 Mich 457; 547 NW2d 686 (1996) is misplaced. Appellant's plan regarding his parents' involvement in the child's life extended beyond merely arranging for day care for the baby. Here, appellant's parents were also going to financially support him and help him make decisions. In this difficult case, we defer to the trial court, which was in a better position to view the witnesses. MCR 2.613; *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Appellant next raises two equal protection challenges to § 39 that he did not raise below. This Court ordinarily will not consider issues raised for the first time on appeal. *Booth v U of*

M Bd of Regents, 444 Mich 211, 234; 507 NW2d 422 (1993). However, we will consider appellant's unpreserved constitutional claims in this case because no questions of fact exist and it is in the interest of justice to do so. *Great Lakes Division of Natl Steel. Corp v City of Ecorse,* 227 Mich App 379, 426; 576 NW2d 667 (1998).

Appellant first claims that subsection 39(l) violates the Equal Protection Clauses of the Michigan and United States Constitutions because it allows his parental rights to be terminated if it is found to be in the best interest of the child, whereas the parental rights of fathers of children who are not subject to adoption can only be terminated in cases of neglect or abuse pursuant to MCL 712A. 19b; MSA 27.3178(598.19b).

Statutes are presumed to be constitutional and must. be construed as such unless it is clearly apparent that the statute is unconstitutional. *In re Hamlet (After Remand),* 225 Mich App 505, 521; 571 NW2d 750 (1997). Equal protection of the law is guaranteed by the federal and state constitutions. US Const, Am XIV; Const 1963, art 1, § 2; *Frame v Nehls,* 452 Mich 171, 183; 550 NW2d 739 (1996). The Michigan and federal Equal Protection Clauses offer similar protection. *Id.* Generally, equal protection requires that persons in similar circumstances be treated similarly. *Thompson v Merritt,* 192 Mich App 412, 424; 481 NW2d 735 (199 1). "[I]t is well established that, even if a law treats groups of people differently, it will not necessarily violate the guarantee of equal protection." *Doe v Dep't of Social Services,* 439 Mich 650, 661; 487 NW2d 16 6 (1992). Neither constitution has been interpreted to require absolute equality. *Id.* When legislation is challenged as violative of the equal protection guarantee under either constitution, it is subjected to judicial scrutiny to determine whether the goals of the legislation justify the differential treatment it authorizes. *Id.* at 661-662. The level of scrutiny applied depends on the type of

classification created by the statute and the nature of the interest affected by the classification. *People v Pitts,* 222 Mich App 260, 272-273; 564 NW2d 93 (1997).

Appellant argues that we should subject the statute to strict scrutiny in this case because it impinges upon the fundamental right of a parent to the care, custody, companionship and management of his child. See *Doe, supra* at 662; *Reist v Bay Circuit Judge,* 396 Mich 326, 339-342; 241 NW2d 55 (1976). We disagree. The United States Supreme Court has recognized there is a distinction between an established relationship between a parent and a child and the existence of a biological link, with the latter entitled to less constitutional protection than the former. *Lehr v Robertson,* 463 US 248, 261, 266-268; 103 S Ct 2985; 77 L Ed 2d 614 (1983). Where a father has never established a "custodial, personal, or financial relationship" with a child, or has abandoned a child, he does not possess the fundamental right of parenthood. *Id.* It is undisputed that appellant has never established a "custodial, personal, or financial relationship" with RFF. Because a fundamental right is not involved, strict scrutiny is not the appropriate level of scrutiny to evaluate this equal protection challenge. *Doe, supra* at 662. Instead, we will utilize the rational basis standard to review appellant's claim. See *Lehr, supra* at 268, n 27 (concluding that the appellant's equal protection argument based upon the manner in which the statute at issue distinguished among classes of fathers was without merit because the statutory distinction was "rational"); see also *In re ASB,* 293 Ill App 3d 836, 847; 688 NE2d 1215 (1997) (applying the rational basis test to a putative father's equal protection challenge where he had not established any relationship with the child.) Under this standard, a statute will not be struck down if the classification scheme it creates is rationally related to a legitimate governmental purpose. *Id.*

Michigan's Adoption Code was enacted for the following

general purpose:

1. To provide that each adoptee in this state who needs adoption services receives those services.

2. To provide procedures and services which will safeguard and promote *the best interests of each adoptee* in need of adoption and which will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, *the rights of the adoptee shall be paramount.*

3. *To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.* [MCL 7102 1 a; MSA 21.3178(555.21a); emphasis added.]

Section 22 defines the term "best interests of the adoptee" as "the sum total of the following factors to be considered, evaluated, and determined by the court *to be applied to give the adoptee permanence at the earliest possible date:* " MCL 710.22; MSA 27.3178(555.22) (emphasis added.) Appellant contends that there is no child in need of adoption services in this case because he stands ready, willing, and able to take custody of his child. However, appellant's argument discounts the other legitimate purpose of the Adoption Code. The Michigan Supreme Court has stated that "[i]n enacting the Adoption Code, the Legislature sought, *inter alia,* to establish procedures to provide for speedy resolution of disputes concerning a putative father's rights where placement of a ... child [born out of wedlock] for adoption is sought." *Barlow, supra* at 228-229. Certainly, the Adoption Code's aims to promote the best interest of the child in a prompt and final, manner are legitimate.

We also find that the difference in treatment of unwed fathers whose children are subject to adoption and unwed

fathers whose children are not subject to adoption is rationally related to the state's legitimate interests in providing for the welfare of children. The difference in treatment is based upon different circumstances. When a child is born out of wedlock and there is a dispute regarding whether the child may be placed for adoption, there is an urgent need to determine the parental rights of the unwed father which is not present where adoption is not being considered. We agree with appellee that if § 39 was not available, and trial courts were required to follow MCL 712A.19b; MSA 27.3178(598.19b) in order to terminate a putative father's rights, the adoption process would be much lengthier and costly and the lives of children would be significantly disrupted, often unnecessarily. Because the whereabouts of many putative fathers is often unknown, without § 39, difficulties would arise in timely establishing a basis for termination of the putative father's parental rights. Such difficulties would make adoption a less attractive alternative because adoptive parents would be less likely to risk taking an infant into their homes for the period it would take to terminate the putative father's parental rights.

Moreover, subsection 39(2) represents a careful accommodation of the competing interests at stake. Where a putative father meets the requirements of subsection 39(2), he is treated exactly the same as an unwed father whose child is not subject to adoption, i.e. his rights may not be terminated except pursuant to MCL 712A. 19b; MSA 27.3178(598.19b).[5] In this case, if appellant had supported his child after he was born, appellant's parental rights could only have been terminated pursuant to MCL 712A.19b; MSA 27.3178(598.19b). However, appellant did not do so.

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[5] The statute also provides that such a father's rights may be terminated pursuant to MCL 710.51(6); MSA 21.3178(551.51)(6). This section of the Adoption Code addresses step-parent adoptions.

Accordingly, there is a legitimate reason to treat him differently than fathers that have supported their child and from fathers whose children are not subject to adoption. It was not a violation of appellant's equal protection rights to terminate his parental rights pursuant to subsection 39(l).

Finally, appellant argues the Adoption Code violates the Equal Protection Clauses of the federal and state constitutions because it treats biological mothers and fathers differently before their parental rights are terminated. If a biological mother wants custody of a child, there is no inquiry into the best interest of the child, and absent abuse or neglect, the child would be returned to her upon her filing a petition for return of the child from the temporary placement. In contrast, appellant contends he is treated much differently under the Adoption Code despite the fact that, according to appellant, he "demonstrated that he has the ability to provide food, clothing, shelter and medical care for the child."

Appellant incorrectly asserts that the statute should be subject to strict scrutiny. Gender based classifications are subject to intermediate scrutiny and, to withstand an equal protection challenge, must serve important governmental objectives and be substantially related to achievement of those objectives. *Lehr v Robertson, supra,* 463 US at 266; *Caban v Mohammed,* 441 US 380, 388; .99 S Ct 1760, 60 L Ed 2d 297 (1979); *Craig v Boren,* 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976). Gender-based classifications will be upheld when men and women are not actually similarly situated in the area covered by the legislation in question and the statutory classification is realistically based upon the differences in their situations. *Parham v Hughes,* 441 US 347, 354; 99 S Ct 1742; 60 L Ed 2d 269 (1979).

Appellant's argument fails to recognize that the true

distinction created by the statute is the difference between the categories of putative fathers. Once again, we look to subsection 39(2) and the opportunity it provides to putative fathers to have their parental rights terminated only pursuant to MCL 712A. 19b; MSA 27.3178(598.19b).6 It is entirely consistent with the Equal Protection Clause to treat fathers of children born out of wedlock who have nothing beyond a biological link with their children differently than mothers of children born out of wedlock. *Lehr, supra* at 267-268.

In short, mothers and fathers of children born out of wedlock are not similarly situated. *Parham, supra* at 355. There are several differences between mothers and fathers of out of wedlock children, including that the identity of the mother of a child born out of wedlock is rarely in question and that "only a father can by voluntary unilateral action make an illegitimate child legitimate." *Id.* Moreover, the mother of a child born out of wedlock has made the decision to give birth to the child rather than have an abortion and, as a result of that decision, has carried the child in her womb for nine months. Accordingly, the gender-based classification created by § 39 is substantially related to the achievement of the Adoption Code's legitimate objective. Appellant's equal protection challenge is without merit.

6 See note 4, *supra.*

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RFF, Minor.

FOR PUBLICATION
August 15, 2000
9:15 a.m.

LAF,

Appellant,

v

No. 221581
Bay Circuit Court
Family Division
LC No. 99-004496-AD

BJF,

Appellee.

Before: Wilder, P.J., and McDonald and Doctoroff, JJ

WILDER, P.J. (dissenting).

I respectfully dissent from the majority opinion affirming the trial court's termination of appellant's parental rights to his son, RFF, pursuant to subsection 39(l) of the Adoption Code, MCL 710.39(l); MSA 27.3178(555.39)(1).

The Adoption Code, MCL 710.21 *et seq.*; MSA 27.3178(555.21) *et seq.*, establishes procedures to safeguard and promote the best interests of the adoptee and to provide for speedy resolution of disputes concerning a putative father's rights where placement of a child for adoption is sought. *In re Barlow,* 404 Mich 216, 228-229; 273 NW2d 35 (1978); *In re Lang*, 236 Mich App 129, 136; 600 NW2d 646 (1999). The Adoption Code also provides substantive standards for determining when it is appropriate to terminate a putative father's parental rights. *In re Barlow, supra*. Section 39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39), creates two categories of putative fathers and provides different standards for terminating the rights of each:

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall

inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

At issue in this case is whether the trial court erred, first by concluding that appellant's parental rights should be evaluated under subsection 39(l), and second by concluding that it was in the best interests of RFF that appellant's parental rights be terminated. I would hold that the trial court erred by finding that under the circumstances of this case appellant did not come within the provisions of subsection 39(2).

Amendment of subsection 39(2) was one of the July 1996 recommendations of Lieutenant Governor Binsfeld's Children's Commission. The Commission contended that a putative father who had not established a custodial relationship with the child should have provided "substantial and regular" care or support to the child in order to be accorded subsection 39(2) status in a proceeding to terminate parental rights. The Commission objected that the term "support" might, be broadly interpreted so as to apply to circumstances where no child support was paid by the putative father until the Family Independence Agency (FIA) sought to

establish paternity, or to circumstances where the child support is paid involuntarily and only because of the entry of a court order. As a result, the Commission urged the adoption of language that would require willing, substantial and regular participation by the putative father. Report of the Binsfeld Children's Commission, pp 83-84 (1996).

SB 415 was introduced in the Michigan Senate in April 1997, reflecting this recommended change to subsection 39(2). The bill passed the Senate in June 1997, and was immediately thereafter referred to the Michigan House Judiciary Committee. The bill was amended in the House Judiciary Committee on March 10, 1998 with the insertion of the language "IN ACCORDANCE WITH THE PUTATIVE FATHERS ABILITY TO PROVIDE SUCH CARE AND SUPPORT," qualifying the "substantial and regular" language added to the statute by the Senate. The amended bill passed the House 106 yeas and 0 nays and returned to the Senate, which concurred in the House amendment 31 yeas, 0 nays, 5 excused, 1 not voting. Contrary to the conclusion reached by the majority, I would conclude that the House amendment effectively codified the case by case, multi-factor approach for determining whether the putative father has provided reasonable care and support under the circumstances of the case set forth. in *In re Gaipa*, 219 Mich App 80; 555 NW2d 867 (1996).

The majority relies on an August 26, 1998 Senate Fiscal Agency Bill Analysis of SB 415 to support its conclusion that subsection 39(2) as amended does not address the circumstances presented by this case. In my view, this particular bill analysis is not persuasive evidence of the Legislature's intent when it amended subsection 39(2).

First, the bill analysis states on its face that it "was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of

legislative intent." Thus, while the analysis may constitute legislative history, it cannot be considered evidence of legislative intent sufficient to satisfy our duty to interpret legislative enactments in accordance with the plain meaning of specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547; 495 NW2d 539 (1993). Second, the August 26, 1998 bill analysis, completed after the bill was enrolled, is nearly identical to a bill analysis completed on June 20, 1997, just after the bill first passed in the Senate, but well before the House amendment to the bill. Nothing in the bill analysis relied on by the majority acknowledges or gives any meaning to the statutory language added by the House which requires inquiry into the putative father's ability to provide support or care.

Third, to the extent legislative analysis reports should be considered by this Court in determining legislative intent, all of the legislative analysis concerning SB 415 should be considered. The House Legislative Analysis Section report of March 11, 1998, prepared as an addendum to the June 20, 1997 Senate Fiscal Agency analysis of SB 415, states in relevant part:

> The House Judiciary committee amended the bill to require that the assessment of whether a putative father's support or care was "substantial and regular" be measured in accordance with his ability to provide support or care."

Nothing in the language of the statute or the available legislative analysis suggests that a judicial determination that a putative father who, because he is unaware of the birth mother's pregnancy is unable to provide support or care, is inconsistent with the legislative intent behind the amendment to subsection 39(2). The House legislative analysis lends credence to the idea that the House amendment was intended to address the due process concerns identified in the Senate

Fiscal Agency analysis. The fact that no legislators voted against SB 415 at final passage further supports this notion. Indeed, in construing a statute, courts should presume that every word has some meaning and should avoid any construction which would render a statute, or any part of it, surplusage or nugatory. *Altman v Meridian Twp,* 439 Mich 623, 635; 487 NW2d 155 (1992). The construction I urge gives meaning to the phrase added by the House amendment, is consistent with common sense and avoids unreasonable consequences. *In re Dawson*, 232 Mich App 690, 696; 591 NW2d 433 (1998).

The trial court found that appellee's concealment of the pregnancy and the type and quality of counseling received from the counseling agency was irrelevant to appellant's ability to provide support.[6] I would reverse and remand for specific

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[6]At the June 25, 1999 hearing during which the trial court found that appellant was a subsection 39(1) punitive father, the trial court stated "...I find that it's not appropriate for the Court to make the giant leap that he had known he would have provided the support. Or had he gotten better counseling from the Adoption Agency, he would have put in for confinement expenses or whatever. I don't' think the law permits the Court to make that kind of leap... He certainly had the ability to contribute something had he wanted to do that, even if it was only care and concern and a ride to the doctor or something. He wasn't able to do that, and he didn't do it. [T]he court, therefore, finds that we can't make the leap that he's a Section 2 father because there was no support, and for whatever reason, I don't believe he qualifies under Section 2." The trial court's written opinion on the best interests findings, dated July 22, 1999, refers to *In re Dawson, supra* at 690 in which this Court concluded that MCL 710.39(2) as written prior to the amendment at issue in this case did not account for a situation in which the mother

factual findings on appellant's ability to provide substantial and regular support or care for appellee or RFF, including findings on whether appellant could provide any support and care, much less substantial and regular support and care, where he learned about the imminent birth of RFF only three weeks before delivery; whether the circumstances under which appellant was told about the pending adoption suggested that adoption was a fait accompli, adversely affecting the timing of his attempt to provide care or support to RFF; whether placement of RFF in the custody of the adoptive parents immediately after his birth, making any contact with RFF extremely difficult, also affected his ability to provide care or support to RFF; and whether the counseling provided by the adoption agency may have misled appellant about his legal obligations if he was to decide to seek custody of RFF.[7]

Even if appellant does not come within the provisions of subsection 39(2) 1 would still reverse the trial court. While I generally agree with the statement of the facts set forth in the majority opinion, several significant facts not mentioned by the majority lead me to the firm and definite conviction that the trial court made a mistake. The record establishes that appellant and his parents were quite shocked to learn that appellant was soon to be a father, and that appellee had made plans to place the baby for adoption. When appellee advised appellant that she was pregnant and would be placing RFF for adoption, she told appellant that her motivation in placing RFF

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conceals the pregnancy from the punitive father and then states "[t]his court reached the same conclusion ..."

[7]The trial court opinion states that by finding it was not in the best interests of the child to award custody to appellant, it was aware that "it appears we are favoring a birth mother who lied, and an adoption agency which poorly handled the pre-adoption matters."

for adoption was her intention to attend college in the fall. Appellant did respond by, indicating that he had planned to attend the Marine ' Corps boot camp that summer, however, the record reflects that appellant stated this in a sarcastic manner and not in an apparent acquiescence to appellee's adoption decision. Nevertheless, appellant and his parents worked to gather information that would enable him to make a reasonably informed decision about whether to agree to appellee's plan under the circumstances.

Terry Budek, the pregnancy counselor with Family and Children's Service of Midland (the adoption agency handling the adoption), sent a letter to appellant before RFF's birth in which she described her position as one "to support all members of the birth family. " The letter further stated that she was there to provide services including advice about "birthparent rights and choices ...free of charge." Appellant also testified that Ms. Budek discouraged him from seeking legal advice and that, in response to, an inquiry about the expenses for care of RFF and his willingness to pay what he could, she told him that the costs were being taken care of by the adoptive parents.

When appellant went to the adoption agency to consent to the adoption, Ms. Budek was not in the office. A volunteer working at the reception desk in the office connected appellant and his mother with Ms. Budek by phone. Ms. Budek told appellant's mother during this phone contact that RFF had been born, and appellant's mother relayed this information to him. When appellant learned through this telephone contact that. RFF had been born, he became upset and began to cry. Appellant acknowledged that he refused to sign the adoption consent at that time, however, the complete record establishes that his refusal was at the behest of the agency receptionist who suggested that appellant go home and think about his decision further.

In deciding it was not in the best interests of RFF to grant custody to appellant, the trial court relied heavily on its determination that appellant was not sufficiently mature to raise RFF and would be heavily relying on his parents for up to several years. Significantly, however, the, trial court consistently sustained objections to testimony from appellant's dentist, aunt and pastor about their observations and knowledge of appellant's maturity and ability to handle responsibility as irrelevant, even though they had known appellant for long periods of time. I believe this was error which prevented appellant from making a complete record about his ability to parent RFF under the difficult circumstances presented here.

In this, regard, I disagree with the majority's conclusion that appellant's reliance on *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996) is misplaced. The Supreme Court's decision noted that from the time Ms. Ireland and Mr. Smith's child (Maranda) was born in 1991 (both parents were in their mid-teens at the time), to Ms. Ireland's enrollment in the University of Michigan in the fall of 1993, Ms. Ireland's mother and grandmother "provided nearly all the necessary support." *Ireland, supra* at 459.[8] The Court acknowledged that following her enrollment in college, Ms. Ireland would likely continue to reside with her mother as well as on campus at the University of Michigan. *Id.* The Court also acknowledged the likelihood that she would change residences at the university, and that she would move again after completing her

studies. The "Court pointedly out stated that "[s]uch changes,

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[8] The court of appeals de3cision and *Ireland v Smith*, 214 Mich App 240; 542 NW2d 344 (1995), similarly noted that after Maranda's birth, "[b]oth parties continued in high school with apparently normal pursuits, including sports, cheerleading, dating and partying ..."

normal for a young adult at this stage of life, d[id] not disqualify Ms. Ireland for custody." *Ireland, supra* at 465.

I agree wholeheartedly with this sentiment and believe it applies in this case. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . ." *In re Boursaw,* 239 Mich App 161, 176; 607 NW2d 408 (1999), quoting *Santosky v Kramer,* 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). This Court reviews hundreds of cases annually in which parental rights have been terminated only after multiple services (i.e., parenting classes, drug treatment, job training) have been provided over multiple months to the parents by the FIA. In this case, similar services were offered appellant by RFF's grandparents, blood relatives. Given the circumstances of this case, including the concealment of the pregnancy and the "counseling" provided by the adoption agency, appellant's fundamental liberty interest to parent should not evaporate because he will not be the model parent in the first years of RFF's life.

For the reasons stated above, I would reverse.

/S/ Kurtis T. Wilder

IV. *In re RFF, a Minor*, unpublished opinion per curiam of the Michigan Supreme Court, decided October 24, 2000 (Docket No. 117555 & (42)):

Order
Entered: October 24, 2000

Michigan Supreme Court
Lansing, Michigan

117555 & (42)

Elizabeth A. Weaver,
Chief Justice

In Re RFF, Minor.

LAF, Appellant, v BJF, Appellee.	Michael F. Cavanagh Marilyn Kelly Clifford W. Taylor Maura D. Corrigan Robert P. Young, Jr. Stephen J. Markman, Justices SC: 117555 COA: 221581 Bay CC: 99-004496-AD

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The application for leave to appeal from the August 15, 2000 decision of the Court of Appeals also is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., would grant leave to appeal.

Corrigan, J., dissents and states as follows:

I would grant leave to appeal in this very troubling termination of parental rights case for the reasons stated in Judge WILDER's dissent. First, the Court of Appeals majority's construction of §39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39) appears dubious at this juncture. I further question the majority's application of the law that they have construed to this case. Section 39 creates two categories of putative fathers and provides different standards for terminating their rights. If the majority has correctly construed the statute, then the current statutory scheme may well violate appellant-father's constitutionally protected liberty interest in the custody of his son. In any event, appellant's attempt to exercise his rights appears to have been effectively thwarted in

this case. These important questions warrant our full review.

Appellant-father, then seventeen and a junior in high school, and appellee-mother, then eighteen and a senior in high school, conceived a child in summer, 1998. Their relationship ended in September, 1998, shortly after appellee became pregnant.. Appellee resumed dating her former boyfriend. Although rumors circulated regarding appellee's pregnancy, she persistently deceived appellant regarding her condition. She did not disclose her pregnancy to appellant. It was not until April 14, 1999, after she had already arranged for the baby's adoption and was working with an adoption agency, that she disclosed the pregnancy to appellant. During their conversation, appellee informed appellant of her desire to attend college after graduation and tentatively secured appellant's agreement to her adoption plan. Appellant immediately informed his parents about the pregnancy and they arranged to visit the adoption agency on May 10, 1999. He was given no information regarding his son's birth and the child was immediately placed with the prospective adoptive parents without any notice to appellant of his child's birth or whereabouts.

An adoption worker told appellant of the birth during his family's visit to the adoption agency on May 10, 1999. After learning of his son's birth, appellant began to cry and would not consent to the adoption. He desired to raise his son with the help of his parents, who agreed to abide by-his decision. Appellant arranged an appointment with his parents and the adoption worker to discuss his desire to keep his son. One week ,after his son's birth, he was finally allowed to see his son at the adoption agency in the presence of the adoptive parents. This visit reaffirmed appellant's desire to obtain custody of his son. During this time, adoption agency workers also misled appellant. The adoption agency advised appellant that because the adoptive parents were paying all the costs, he need not

furnish any support. Further, the adoption worker advised appellant that he had a good chance of obtaining custody. Appellant's family thereupon retained counsel. Counsel moved on May 28, 1999, for the return of the child and a June 25, 1999, hearing date was set. On August 3, 1999, the court terminated appellant's parental rights after, finding it was not in the child's best interests to be reared by his natural father.

The Michigan Adoption Code divides fathers into two categories: those who have established a custodial relationship with the child or have provided substantial and regular support or care in accordance with their ability to provide such support or care for the mother during pregnancy or for either mother or child after birth ("do-something" fathers) and those who have not ("do-nothing" fathers). Subsection 2 provides that a do something father's parental rights may be terminated only "by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA." In essence, a do-something father's rights may be terminated only for abuse or neglect. By contrast, a do-nothing father's rights may be terminated under § 39(l), requiring the court to "inquire into his fitness and his ability to properly care for the child and [to] determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child."

While appellant never provided substantial and regular support or care, appellee's deception and the agency's misrepresentation were factors effectively destroying appellant's ability to provide support. Appellant correctly contends that appellee's deception regarding her pregnancy made it impossible for him to provide support or care during the pregnancy. He notes that § 39(2) requires a father to provide substantial and regular support or care in accordance

with his ability to provide such support or care. Thus, appellant argues, the father's duty under § 39(2) is coextensive with his ability to comply with the duty. In addition to appellee's deception regarding the pregnancy, appellant contends that the adoption agency misled him after the child was born by assuring him that the adoptive parents would pay all costs.

The Court of Appeals majority rejected appellant's construction because the statutory language did not clearly address the situation in which a mother deceives a father about her pregnancy. The Court stated that the word "ability" could be narrowly interpreted to include only financial ability, or it could be construed "in a broader sense to encompass the situation in this case." 242 Mich App_____, ____ (2000). Assuming the language was ambiguous, the Court Interpreted the statute not to apply to deceived fathers. The Court examined legislative history to conclude that the Legislature did not intend to address deceived fathers when it amended the statute in 1998 to add the "ability" language. The Court nonetheless urged the Legislature to consider how a deceived father should be treated under § 39.

In dissent, Judge WILDER examined the legislative history and disagreed with the majority's interpretation of the Legislature's intent. He urged a construction that would permit courts to take into account a mother's deception when determining a father's ability to provide support or care. Judge WILDER favored a reversal and remand for specific factual findings on appellant's ability to provide substantial and regular support or care for appellee or the child in these circumstances. Alternatively, Judge WILDER would have reversed the trial court, s finding's on the statutory best-interest factors under § 39(l).

I question both the mode and result of the Court of Appeals majority's statutory analysis. A court's obligation when

examining a statute is to discern the legislative intent that may reasonably be inferred from the text of the statute itself. *People V McIntire*, 461 Mich 147, 152-153 (1999). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Id.*, p 153. Nontextual modes of construction invariably lead to judicial speculation about the Legislature's unstated intent and the injection of the court's own policy preferences. *Id.*

The Court of Appeals majority here looked beyond the plain words of § 39 after assuming that the statute was ambiguous. The majority never identified, however, why the text of § 39 was "internally inconsistent or ambiguous, thereby giving rise to the need for interpretation." *Id.*, p 157, n 9. Rather than struggling with the meaning of the words in the statute, the majority hypothesized that the Legislature might have restricted the term "ability," to a meaning that did not include deception by the mother. The majority suggested that the Legislature may have intended "ability" to mean "financial ability," even though no such qualification is found in the text of the statute. In essence, the majority speculated that the Legislature did not mean what it clearly stated. Judicial construction is permitted only when the words of a statute are internally inconsistent or ambiguous, not when the court speculates that the Legislature might have meant something other than what it said.

Given the importance of this statute and the enormous stakes in this case, I would grant leave to apply the correct principles of construction. The father's duty is to provide substantial and regular support or care in accordance with his "ability to provide such support or care." The father's duty is thus conditioned upon his "ability" to fulfill that duty.

"Ability" means the "power or capacity to do or act physically, mentally, legally, morally, or financially." *Random House Webster's College Dictionary* (2000). Thus, a father's financial power or capacity to provide support or care may be only one aspect of the ability analysis under the statute. A father may also lack the physical, mental, legal, or moral power or capacity to act. When a father lacks knowledge of a pregnancy because of, the mother's deception and is induced not to act by the agency's misrepresentation, he arguably lacks the power or capacity to provide support or care, since he does not even know that support or care are needed!

A separate problem exists regarding the application of §39 to underage fathers. Does an underage father ever have the "ability" to provide support or care? If a minor cannot sign a contract or be subject to a support order, how could he have any legal "ability" to provide support or care? If the Court of Appeals majority's construction is correct, then § 39 arguably would never apply to underage fathers, and the statute would effectively collapse in upon itself. It effectively deprives all underage fathers of whatever rights they enjoy.

If the majority has correctly construed the statute, I would still grant leave to consider the serious due process issues raised by the statute's application in these circumstances. If the statute really does permit a deceived father to fall through the cracks in this fashion, then it impinges upon appellant's fundamental liberty interest in the custody of his child.

In *Stanley v Illinois,* 405 US 645 (1972), the Court held that an unmarried father was entitled-to a hearing on his fitness as a parent before the state could take away his children. Illinois allowed the state to circumvent neglect proceedings for unwed fathers. It allowed termination of unmarried mothers' rights only after a hearing and proof of

neglect, but unmarried fathers lost their rights without a hearing on parental fitness and proof of neglect. Invalidating Illinois' scheme, the Supreme Court noted:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a"parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. [*Id.*, p 651 (citations and internal quotation omitted).]

The right to conceive and raise one's children is fundamental. *Id.* "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." *Id.* (citations omitted).

The Supreme Court recently reaffirmed the liberty interest of parents in the custody, care, control, and upbringing of their children. In *Troxel v Granville,* 530 US___ ; 120 S Ct 2054; 147 L Ed 2d 49 (2000), the Court invalidated a Washington statute that permitted anyone to petition for visitation with children and allowed a judge to award visitation upon a showing that it would be in the best interest of the children. The Supreme Court noted that the interest of parents in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*, 120 S Ct 2060. The rights of parents under the Due Process Clause includes their right to establish a home and bring up children. *Id.* "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for

obligations the state can neither supply nor hinder." *Id.*

The Washington statute did not require a finding that the parents were unfit before the judge awarded visitation to a third party. This scheme contravened the constitutional presumption that fit parents act in the best interests of their children. *Id.*, 120 S Ct 2061. The statute impermissibly placed the best interest determination solely in the hands of a judge and accorded no deference to the parent's judgment. "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*, 120 S Ct 2061.

Section 39 raises many constitutional questions. If a father's failure to provide support or care is due solely to the mother's deception, then is he denied equal protection under the Court of Appeals majority's construction of the statute? A similarly situated father who was not deceived would have an opportunity to provide support or care; his rights could then be terminated only upon a showing of abuse or neglect. The deceived father, however, will receive no such benefit; his rights may be terminated under § 39(l) solely on the basis of a judge's determination of the best interests of the child.

I also question whether § 39(l) accords the constitutionally required deference to fit fathers who were deceived. It does require the court to inquire into the father's fitness and ability to care for the child. It then goes on, however, to require the court to terminate the father's rights upon a finding that it would not be in the best interest of the child to grant custody to the father. Section 39(l) does not expressly require the court to find that the father is unfit before terminating his rights. The statute instead allows termination upon application of a free-floating best interest

evaluation by a judge.

I do not know the correct outcome for this troubling case. I am not certain whether deceived fathers fall within the purview of § 39(2) and, if not, whether their constitutional rights are violated. In light of the enormous consequences of the Court of Appeals majority's decision, however, I would not let its questionable analysis stand. We should grant leave.

V. U.S. Const. amend. XIV:

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of

the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

VI. 28 U.S.C. §1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the

validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

VII. 28 U.S.C. §2403(b):

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of

constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

VIII. MCL §710.21a; MSA §27.3178(555.21a)[a]:

The general purposes of this chapter are:

(a) To provide that each adoptee in this state who needs adoption services receives those services.

(b) To provide procedures and services which will safeguard and promote the best interests of each adoptee in need of adoption and which will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount.

(c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.

VIV. MCL §710.36; MSA §27.3178(555.36):

(1) If a child is claimed to be born out of wedlock and the mother executes or proposes to execute a release or consent relinquishing her rights to the child or joins in a petition for adoption filed by her husband, and the release or consent of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in this section and sections 37 and 39 of this chapter.

(2) Proof of service of a notice of intent to release or consent or the putative father's verified acknowledgment of notice of intent to release or consent shall be filed with the court, if the notice was given to the putative father. The court shall request the vital records division of the department of public health to send to the court a copy of any notice of intent to claim paternity of the particular child which the division has

received.

(3) Notice of the hearing shall be served upon the following:

(a) A putative father who has timely filed a notice of intent to claim paternity as provided in section 33 or 34 of this chapter.

(b) A putative father who was not served a notice of intent to release or consent at least 30 days before the expected date of confinement specified in the notice of intent to release or consent.

(c) Any other male who was not served pursuant to section 34(1) of this chapter with a notice of intent to release or consent and who the court has reason to believe may be the father of the child.

(4) The notice of hearing shall inform the putative father that his failure to appear at the hearing shall constitute a denial of his interest in custody of the child, which denial shall result in the court's termination of his rights to the child.

(5) Proof of service of the notice of hearing required by subsection (3) shall be filed with the court. A verified acknowledgment of service by the party to be served is proof of personal service. Notice of the hearing shall not be required if the putative father is present at the hearing. A waiver of notice of hearing by a person entitled to receive it is sufficient.

(6) The court shall receive evidence as to the identity of the father of the child. Based upon the evidence received, the court shall enter a finding identifying the father or declaring that the identity of the father cannot be determined.

(7) If the court finds that the father of the child is a person who did not receive either a timely notice of intent to release or consent pursuant to section 34(1) of this chapter or a notice required pursuant to subsection (3), and who has neither waived his right to notice of hearing nor is present at the hearing, the court shall adjourn further proceedings until that person is served with a notice of hearing.

X. MCL §710.39; MSA §27.3178(555.39):

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

(3) If the parental rights of the mother are terminated pursuant to this chapter or other law and if the court awards custody of a child born out of wedlock to the putative father, the court shall enter an order granting custody to the putative father and legitimating the child for all purposes. Upon entry of an order granting custody and legitimating the child, the clerk of the court shall collect a fee of $35.00 from the putative father. The clerk shall retain $9.00 of the fee and remit the $26.00 balance, along with a written report of the order granting custody and legitimating the child, to the director of the department of community health. The report shall be on a form prescribed by or in a manner approved by the director of the department of community health. Regardless of whether the fee required by this section is collected, the clerk shall transmit and the department of community health shall receive the report of the order granting custody and legitimating the child.

XI. MCL §710.51(6); MSA §27.8178(555.51)(6):

If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:

(a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

XII. MCL §712A.19b; MSA §27.3178(598.19b):

(1) Except as provided in subsection (4), if a child remains in foster care in the temporary custody of the court following a review hearing under section 19(3) of this chapter or a permanency planning hearing under section 19a of this chapter or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or petition of the child, guardian, custodian, concerned person as defined in subsection (6), agency, or children's ombudsman as authorized in section 7 of the children's ombudsman act, 1994 PA 204, MCL 722.927, the court shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court. The court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be

terminated. The court shall issue an opinion or order regarding a petition for termination of parental rights within 70 days after the commencement of the initial hearing on the petition. However, the court's failure to issue an opinion within 70 days does not dismiss the petition.

(2) Not less than 14 days before a hearing to determine if the parental rights to a child should be terminated, written notice of the hearing shall be served upon all of the following:

(a) The agency. The agency shall advise the child of the hearing if the child is 11 years of age or older.

(b) The child's foster parent or custodian.

(c) The child's parents.

(d) If the child has a guardian, the child's guardian.

(e) If the child has a guardian ad litem, the child's guardian ad litem.

(f) If tribal affiliation has been determined, the Indian tribe's elected leader.

(g) The child's attorney and each party's attorney.

(h) If the child is 11 years of age or older, the child.

(i) The prosecutor.

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(a) The child has been deserted under either of the following circumstances:

(i) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.

(ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of

the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

(iii) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the

court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(d) The child's parent has placed the child in a limited guardianship under section 424a of the revised probate code, 1978 PA 642, MCL 700.424a, and has substantially failed, without good cause, to comply with a limited guardianship

placement plan described in section 424a of the revised probate code, 1978 PA 642, MCL 700.424a, or section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

(e) The child has a guardian under the revised probate code, 1978 PA 642, MCL 700.1 to 700.993, or the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in section 424b or 424c of the revised probate code, 1978 PA 642, MCL 700.424b and 700.424c, or section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, MCL 700.5207 and 700.5209, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

(f) The child has a guardian under the revised probate

code, 1978 PA 642, MCL 700.1 to 700.993, or the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred:

(i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's

age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration,

attempted penetration, or assault with intent to penetrate.

(iii) Battering, torture, or other severe physical abuse.

(iv) Loss or serious impairment of an organ or limb.

(v) Life threatening injury.

(vi) Murder or attempted murder.

(vii) Voluntary manslaughter.

(viii) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

(l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.

(m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state.

(n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child

relationship with the parent would be harmful to the child:

(i) A violation of section 316, 317, 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.316, 750.317, 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g.

(ii) A violation of a criminal statute, an element of which is the use of force or the threat of force, and which subjects the parent to sentencing under section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

(iii) A federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (i) or (ii).

(4) If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing. If a petition to terminate parental rights to a child is filed, parenting time for a parent who is a subject of the petition is

automatically suspended and, except as otherwise provided in this subsection, remains suspended at least until a decision is issued on the termination petition. If a parent whose parenting time is suspended under this subsection establishes, and the court determines, that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate.

(5) If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

(6) As used in this section, "concerned person" means a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) or (g) and who has contacted the family independence agency, the

prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.

XIII. MCL §710.22(f); MSA §27.3178(555.22):

As used in this chapter:

(a) "Adoptee" means the individual who is to be adopted, regardless of whether the individual is a child or an adult.

(b) "Adoption attorney" means an attorney acting as counsel in a direct placement adoption who meets all of the following requirements:

(i) Has completed at least 12 hours of continuing education in this state during the past 5 years in courses integrating the legal and social aspects of adoption.

(ii) Maintains an up-to-date file of individuals licensed or registered under either the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.1101 to 333.25211 of the Michigan Compiled Laws, or the

occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.101 to 339.2721 of the Michigan Compiled Laws, and agencies to whom referrals may be made for counseling services needed by an adoption client.

(iii) Has registered as an adoption attorney with the children's ombudsman as provided in section 5 of the foster care and adoption services act, Act No. 203 of the Public Acts of 1994, being sections 722.951 to 722.960 of the Michigan Compiled Laws.

(c) "Adult former sibling" means an individual who is 18 years of age or older and is related to an adult adoptee either biologically or through adoption by at least 1 common parent, regardless of whether the adult former sibling ever lived in the same household as the adult adoptee.

(d) "Agency placement" means a placement in which a child placing agency, the department, or a court selects the adoptive parent for the child and transfers physical custody of the child to the prospective adoptive parent.

(e) "Attending practitioner" means a licensed physician or a registered professional nurse certified as a nurse midwife by the Michigan board of nursing.

(f) "Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.

(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father.

(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.

(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under

section 39 of this chapter, of the putative father, and of the adoptee.

(viii) The home, school, and community record of the adoptee.

(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

(g) "Born out of wedlock" means a child conceived and born to a woman who was not married from the conception to the date of birth of the child, or a child whom the court has determined to be a child born during a marriage but not the issue of that marriage.

(h) "Central adoption registry" means the registry

Supreme Court, U.S.
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(2)

Docket Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES

LUKE ALLAN FRISBEY,
Petitioner,

v.

BRANDY JO FREED,
Respondent.

On petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Michigan

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.

XIII. MCL §710.22(f); MSA §27.3178(555.22):

As used in this chapter:

(a) "Adoptee" means the individual who is to be adopted, regardless of whether the individual is a child or an adult.

(b) "Adoption attorney" means an attorney acting as counsel in a direct placement adoption who meets all of the following requirements:

(i) Has completed at least 12 hours of continuing education in this state during the past 5 years in courses integrating the legal and social aspects of adoption.

(ii) Maintains an up-to-date file of individuals licensed or registered under either the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.1101 to 333.25211 of the Michigan Compiled Laws, or the

occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.101 to 339.2721 of the Michigan Compiled Laws, and agencies to whom referrals may be made for counseling services needed by an adoption client.

(iii) Has registered as an adoption attorney with the children's ombudsman as provided in section 5 of the foster care and adoption services act, Act No. 203 of the Public Acts of 1994, being sections 722.951 to 722.960 of the Michigan Compiled Laws.

(c) "Adult former sibling" means an individual who is 18 years of age or older and is related to an adult adoptee either biologically or through adoption by at least 1 common parent, regardless of whether the adult former sibling ever lived in the same household as the adult adoptee.

(d) "Agency placement" means a placement in which a child placing agency, the department, or a court selects the adoptive parent for the child and transfers physical custody of the child to the prospective adoptive parent.

(e) "Attending practitioner" means a licensed physician or a registered professional nurse certified as a nurse midwife by the Michigan board of nursing.

(f) "Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.

(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father.

(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.

(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under

section 39 of this chapter, of the putative father, and of the adoptee.

(viii) The home, school, and community record of the adoptee.

(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

(g) "Born out of wedlock" means a child conceived and born to a woman who was not married from the conception to the date of birth of the child, or a child whom the court has determined to be a child born during a marriage but not the issue of that marriage.

(h) "Central adoption registry" means the registry

established by the department pursuant to section 27b of this chapter to control the release of identifying adoption information.

(i) "Child" means an individual less than 18 years of age.

(j) "Child placing agency" means a private organization licensed under Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, to place children for adoption.

(k) "Consent" means a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent.

(l) "Court" means the family division of circuit court of this state, or when the context requires, the court having jurisdiction over adoption in another state or country.

(m) "Department" means the family independence agency.

(n) "Direct placement" means a placement in which a

parent or guardian selects an adoptive parent for a child, other than a stepparent or an individual related to the child within the fifth degree by marriage, blood, or adoption, and transfers physical custody of the child to the prospective adoptive parent.

(o) "Formal placement" means a placement that is approved by the court under section 51 of this chapter.

(p) "Person" means an individual, partnership, corporation, association, governmental entity, or other legal entity.

(q) "Petitioner", except as used in section 68b of this chapter, means the individual or individuals who file an adoption petition with the court.

(r) "Placement" or "to place" means selection of an adoptive parent for a child and transfer of physical custody of the child to a prospective adoptive parent pursuant to this chapter.

(s) "Release" means a document in which all parental

rights over a specific child are voluntarily relinquished to the department or to a child placing agency.

(t) "Rescission petition" means a petition filed by an adult adoptee and his or her parent whose rights have been terminated to rescind the adoption in which a stepparent acquired parental rights and to restore parental rights of that parent pursuant to section 66 of this chapter.

(u) "Suitable to be a parent of an adoptee" means a conclusion that there is no specific concern with respect to an individual that would suggest that placement of any child, or a particular child, in the home of the individual would pose a risk of harm to the physical or psychological well-being of the child.

(v) "Temporary placement" means a placement that occurs before court approval under section 51 of this chapter and that meets the requirements of section 23d of this chapter.

(w) "Within the fifth degree by marriage, blood, or adoption" means any of the following relationships: parent,

step-parent, grandparent, step-grandparent, brother, step-brother, sister, step-sister, uncle, step-uncle, aunt, step-aunt, first cousin, step-first cousin, great aunt, step-great aunt, great uncle, step-great uncle, great grandparent, step-great grandparent, first cousin once removed, step-first cousin once removed, great great grandparent, step-great great grandparent, great great uncle, step-great great uncle, great great aunt, step-great great aunt, great great great grandparent, or step-great great great grandparent.

(3)

No. 00-1482

Supreme Court, U.S.
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In The

Supreme Court of the United States

IN THE MATTER OF RFF, a Minor, LAF,

Petitioner,

v.

BJF,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does MCL 710.39 violate due process by not creating a third category of putative fathers or by not presuming that certain fathers are "do-something" fathers, where the father has not established a custodial relationship with his child and has not provided any support or care to the child or the child's mother during the pregnancy or after the child's birth?

II. Does MCL 710.39 violate equal protection because it treats a putative father who has not established a custodial relationship with his child or who has not provided any support or care to the child or the child's mother during the pregnancy or after the child's birth, differently than a putative father who has provided support or care?

III. Does MCL 710.39 violate due process because it requires inquiry into the best interest of the child?

LIST OF PARTIES

The Petition does not accurately list the parties to the proceeding. MCL 710.67 requires that the Court keep confidential the names of the biological and adoptive parents of an adoptee. The original decision of the Michigan Court of Appeals published the names of the birth parents but the Court subsequently vacated that order and republished the case as *In re RFF, Minor, LAT v BJF*. The Michigan Supreme Court styled the case *In the Matter of RFF, a Minor (DOB 05/09/99)*. The parties should be characterized in that manner in this Court as well.

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OPINIONS BELOW

The opinion of the Michigan Supreme Court, denying leave to appeal to review the merits, appears at Appendix C to the Opposition Brief and is reported at 618 NW2d 575 (2000).

The opinion of the Michigan Court of Appeals appears at Appendix A to the Opposition Brief and is reported at 242 Mich App 188, 617 NW2d 745 (2000).

The opinion of the Bay County Circuit Court Family Law Division, decided August 3, 1999 (Docket No. 99-4496-AD) appears at Appendix B to the Opposition Brief.

JURISDICTION

The Michigan Supreme Court entered the order from which Petitioner seeks review on October 24, 2000. In that order, attached at Appendix C, the Michigan Supreme Court denied leave to appeal the decision of the Michigan Court of Appeals (attached at Appendix A), which affirmed the trial court's opinion (attached at Appendix B).

Petitioner cites 28 USCS Section 1257(a) as his basis for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

USCA Const. Amend. 14:

See Appendix H.

28 USCA 1257(a):

See Appendix I.

MCL 710.39; MSA 27.3178(555.39):

See Appendix F.

MCL 710.22(f).

See Appendix G.

STATEMENT OF THE CASE

Brandy and Luke were high school students at Ithaca High School when they began dating in the fall of 1997. (June 25, 1999 Transcript of the Bay County Circuit Court, Family Division p. 25). During that time, they engaged in sexual relations. (T., p. 7, 25-56). In the fall of 1998, the couple ceased their relationship but still attended the same high school on a daily basis.

Luke recalled that in November of 1998, Brandy approached him at school to tell him that she had missed a [menstrual] period. (T., p. 20). Brandy recalled that this conversation took place in January of 1999. (T., p. 27). Whenever it occurred, Luke did not recall how he responded to her confidence in him. (T., p. 27). Brandy testified that he said nothing to her. He did not say, "If

you're pregnant, I will help" or anything of that nature. (T., p. 8). Luke testified that he knew in the middle of December that he might be the baby's father. He just had a "gut feeling;" (T., p. 46) however, he did not contact Brandy after that until rumors began circulating at school that Brandy might be pregnant. (T., p. 28).

Luke, suspecting that Brandy was pregnant and he was the father, inquired of Brandy during January and February as to whether the rumors were true. (T., pp. 28-29). Brandy responded, "I don't know. They're a bunch of crap." (T., p. 28). Brandy never denied that Luke was the father of the baby. (T., p. 9). Brandy did not tell anyone that she was pregnant, with the hopes that it would just go away. (T., p. 12).

Brandy told Luke by telephone on April 14, 1999, that she was pregnant and that he was the father. (T., p. 10). Brandy and her mother had been to the adoption agency in Midland and had talked with an adoption worker, Ms. Terri Budek. Ms. Budek also spoke with Luke's parents and sent them a letter dated April 21, 1999. (Attached at Appendix D). The letter explains to Luke and his parents Ms. Budek's position as a pregnancy counselor. The letter states that the agency is involved in an adoption plan for the baby. The letter also includes the language, "You may also consult an attorney."

Included with the letter was a Notice to Putative Father and Custody Statement, which includes Brandy's expected delivery date. (Attached at Appendix E). Thus, both Luke and his parents were informed of the due date of the baby. Luke also admitted that the agency had told

him that the upcoming hearing was to terminate his parental rights. (T., p. 39).

During the April 14, 1999 telephone conversation, Luke did not ask Brandy any questions which could have involved him in her pregnancy and the birth of the child. He did not ask if she needed anything; he did not ask if she had been to the doctor; he did not ask how she was feeling; he did not ask if she needed money. (T., p. 10).

After April 14, Brandy again telephoned Luke. She had tried to meet him after school, but he failed to show up for the meeting. (T., p. 12). During the second call, Luke admitted that he had received the paperwork. (T., p. 13). He did not disagree with the adoption plan at that time. He also did not inquire about Brandy's health, about the due date of the baby, about the impending birth, nor did he ask if she needed anything, financially or otherwise. (T., p. 13). Luke stated that he planned to consent to the adoption. (T., p. 34).

Brandy gave birth to RFF on May 9, 1999. She did not leave word at the hospital that Luke could not visit or call (T., p. 14); however, Luke did not visit or call. In fact, Brandy did not receive any inquiry from Luke as to her health and well being or that of the baby. (T., p. 15).

After her cesarean section, Brandy returned to school. She and Luke attended the same high school for about two weeks until her graduation on May 27, 1999. Brandy saw Luke at school, but he did not ask her any questions about her health, about her needs, about the birth of the baby, or about the baby's needs. In fact, Luke did not even speak to her. (T., p. 16).

From the time of his "gut feeling" in as early as November of 1998, until the trial court hearing on June 25, 1999, Luke took no steps, other than asking in the high school hallway about some rumors, to provide support of any kind to Brandy or the baby. From April 14, 1999 to the time of the hearing on June 25, 1999, Luke had over two months to behave as a father should. He could have paid child support directly to Brandy to demonstrate his ability and intention to do so for the remainder of RFF's life. He could have called Brandy and asked her about the birth plan. He could have called and asked about her hospital plans. He could have called and asked about her medical expenses and those of the baby and determined whether or not the costs would be covered. He could have asked Brandy if she needed anything. Instead, once he was certain of the pregnancy, he asked no questions and paid no support to Brandy or for the baby. He also did not attempt to do so through the County Friend of the Court office, which is set up for that purpose.

At the June 25, 1999 hearing, the trial court identified Luke as the father of the child. The trial court then determined that Luke had not provided "substantial and regular support or care" for purposes of meeting subsection (2) of MCL 710.39. The hearing continued to determine if the best interest of the child would be served by granting Luke's request for custody of the child or whether Luke's parental rights should be terminated pursuant to MCL 710.39(1). The trial court issued a written opinion on July 22, 1999, in which it concluded after application of the best interest factors that it would not be in the child's best interest to award custody to Luke.

Accordingly, on August 3, 1999, the trial court terminated his parental rights.

On August 15, 2000, the Michigan Court of Appeals affirmed the trial court's decision. The Michigan Supreme Court denied leave to appeal on October 24, 2000. Petitioner then filed the request for a writ of certiorari to this Court.

REASONS FOR DENYING THE PETITION

I. Does MCL 710.39 violate due process by not creating a third category of putative fathers or by not presuming that certain fathers are "do-something" fathers, where the father has not established a custodial relationship with his child and has not provided any support or care to the child or the child's mother during the pregnancy or after the child's birth?

Petitioner seeks review of an issue that was first raised in his Petition for Leave to Appeal to the Michigan Supreme Court, which request was denied. Petitioner's claim that MCL 710.39 violates due process was not addressed at the trial court or at the Michigan Court of Appeals. The only constitutional issue Petitioner raised at the Michigan Court of Appeals (which was not raised at the trial court) was that MCL 710.39(1) violates the Equal Protection Clause on two grounds. Petitioner has since abandoned those arguments.

Petitioner now claims that MCL 710.39 violates his due process rights because he is included in the category of a "do-nothing" father. He claims that the Michigan

Court of Appeals violated his due process rights because it did not create a third category of putative fathers or because it did not presume that he was a "do-something" father.

This Court does not review questions not pressed or passed on by the courts below. *Springfield v Kibbe*, 480 US 257 (1987). Apparently, the Petitioner will continue to create new issues, as he is unsuccessful in others. Petitioner failed to preserve the issue he now raises, and on that basis, this Court should deny his request for a writ of certiorari.

If the Court decides to address Petitioner's argument that MCL 710.39 violates due process, the Court should find that the statute is constitutional. The procedures in the Michigan Adoption Code for notice, an opportunity to be heard, and a fair hearing on the evidence in each case, provide due process and protect a father's interest.

Statutes are presumed to be constitutional and are to be construed as constitutional unless it is *clearly apparent* that the statute is unconstitutional. *In re Hamlet*, (after remand), 225 Mich App 505, 571 NW2d 750 (1997). The U.S. Constitution provides that no person should be deprived of life, liberty, or property, without due process of law. USC, Const. Amend. 14. Underlying the concept of due process is the right not to have determinations affecting one's rights made in an arbitrary and capricious manner without the existence of reasonable standards. *Casad v City of Jackson*, 79 Mich App 573, 263 NW2d 19 (1977). Due process of law requires notice and an opportunity to be heard and imports the right to a fair trial of

the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence. *Napuche v Liquor Control Commission*, 336 Mich 398, 58 NW2d 118 (1953).

The Fourteenth Amendment was not designed to interfere with the power of the states to protect the lives, liberty, and the property of its citizens, nor with the exercise of that power in the adjudications of state courts in administering the process provided by the state laws. *In re Converse*, 137 US 624, 34 LEd 796, 11 SCt 191 (1891), affg 42 F 217 (1890).

The Petitioner alleges that the Michigan Court of Appeals made a presumption that somehow violates due process. The Michigan Court of Appeals dealt strictly with the facts as determined by the trial court, and the fact is that Petitioner did not provide substantial and regular support or care. The Michigan Court of Appeals made no presumption.

On the other hand, Petitioner requests a presumption that all fathers who may not have had a significant period of time to deal with an unplanned pregnancy (or those that truly know nothing about the pregnancy) are a "do-something" father – to do this would be totally against statutory construction and turn the relevant statute on its head.

The Petitioner fails to acknowledge that Michigan's Adoption Code, and specifically the statute at issue, fully protects the rights of fathers. If the father is not married to the mother, he is given notice of the hearing and only has to appear at the hearing for his rights to be fully

considered. Where an unwed father appears at the hearing and requests custody, to retain his parental rights he must put forth evidence to show he established a custodial relationship with the child or that he provided support or care to the child or the mother. If the father is unable to prove those very basic facts, then he must meet the best interests standard in order to obtain custody of the child. There are many due process protections provided to the father in the Michigan Adoption Code.

The Petitioner asks the Court to rewrite the statute enacted by the legislature so that there is a third category of putative fathers, the so-called "neutral fathers" or to presume that all "neutral fathers" are "do-something" fathers. The Michigan Court of Appeals followed the rules of statutory construction by appropriately considering the specific language used by the legislature and by not creating the unwritten exception. The inquiry is simply did the father have an established custodial relationship with the child and/or did he provide support or care to the mother or the child. The legislature did not require further inquiry into the reason(s) why or why not.

The Michigan Court of Appeals, citing *Lehr v Robertson*, 463 US 248 (1983), set forth the appropriate standard of scrutiny; that is, "where a father has never established a 'custodial, personal, or financial relationship' with a child . . . he does not possess the fundamental right of parenthood. It is undisputed that [Petitioner] has never established a 'custodial, personal, or financial' relationship' with RFF." The Court of Appeals went on to hold that because a fundamental right was not involved, the rational basis standard would apply rather than strict scrutiny. Under that standard, so long as a statute is

rationally related to a state interest, it does not violate due process. Certainly, the purposes of the Michigan Adoption Code, MCL 710.21a, are legitimate state interests.[1]

Any further analysis is not for the Courts, but rather for the legislature as stated by the Michigan Court of Appeals in this case. A court may not repeal a statute on the basis of policy concerns – that is the job of the legislature. And while a court can encourage the legislature to reconsider the effects of the law (as it did in the case at issue), it has to have a constitutional basis to invalidate a statute. See *Hauser v Reilly*, 212 Mich App 184, 536 NW2d 865, 869 (1995).

The *Hauser* case addressed a similar due process claim with respect to Michigan's Paternity Act. In that case, a putative father filed a paternity action alleging that he was the father of a child born to the mother while she was married to another man and requesting an order of filiation and visitation. He claimed that if he did not have standing to bring such a claim, he would be denied due process as a father. The Court in *Hauser* held that the

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[1] Michigan's Adoption Code was enacted for the following general purpose: 1. To provide that each adoptee in this state who needs adoption services receives those services. 2. To provide procedures and services which will safeguard and promote the best interests of the adoptee in need of adoption and which will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount. 3. To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest time. MCL 710.21a; MSA 21.3178(555.21a).

Paternity Act does not deprive a putative father of his right to due process even though he has no standing.

The Court in *Hauser* stated that:

> "the putative father's liberty interest [is derived] from the father's biological link with his child, combined with a substantial parent-child relationship . . . **[A]n unwed father's mere biological link with his child is insufficient to establish a liberty interest.**" (emphasis added).

The Court also held that:

> "if plaintiff in this case had an established relationship with his child, we would hold that he had a protected liberty interest in that relationship, that entitled him to due process of law. However, because plaintiff has no such relationship, we hold that the Paternity Act did not deny him his right to due process."

The Court went on to state,

> "A person is not deprived of liberty, however, simply because state action imposes burdens or subjects individuals to restraints in matters that affect public interests or the rights of others. . . . While we sympathize with plaintiff, who was allegedly denied access to his child by the mother, we cannot agree that any putative father who could establish paternity by scientific means has a liberty interest in all proceedings concerning that child. It is true that both parents and children have a due process liberty interest in their family life. *In re Clausen*, 442 Mich 648, 502 NW2d 649 (1993). **The protected interest, however, is in the family life, not in the mere biological link between parent and child.** A

> rapist has a biological link with a child conceived by that rape. If we held that a mere biological link would ensure a father of a liberty interest in the rights to a relationship with the child, the rapist would be entitled to due process protections." *Hauser*, at 188-189. (emphasis added).

MCL 710.39 provides even more due process if the father had an established relationship or provided support to the child of the mother. In contrast to the Michigan Paternity Act, however, the Michigan Adoption Code provides additional due process to a putative father *even if he has not established a relationship or provided support;* and that is the application of the best interest test to each putative father's individual situation.

Petitioner would like to be treated the same as a married father, or an unwed father that has established a custodial relationship with the child or provided support or care to the child or the mother. As stated by the *Hauser* Court, "an unwed father's mere biological link with his child is insufficient."

The statute at issue focuses on the acts of the father. If the father did something, he falls within one category; if he did nothing, he falls within the other category. The legislature did not include an exception to the "do-nothing" provision.

There is no constitutional basis for invalidating MCL 710.39. Further, this Court cannot create a third category of putative fathers nor can it create an exception to the "do-nothing" category as both would be enacting legislation. Therefore, there is no compelling reason to grant Petitioner's petition and it should be denied.

II. Does MCL 710.39 violate equal protection because it treats a putative father who has not established a custodial relationship with his child and who has not provided any support or care to the child or the child's mother during the pregnancy or after the child's birth, differently than a putative father who has provided support or care?

Petitioner argues that he was denied equal protection of the law because he was a "deceived father **prohibited** from providing support or care [for the baby or the mother] and **forced** to have his parental rights determined solely on the basis of . . . the best interest of the child." Petition for Writ of Certiorari, p. 15. (emphasis added). Petitioner misrepresents that application of the statute to a "similarly situated father" who was not "deceived" or knew about the child results in treatment different from that given to Petitioner. That similarly situated father **still** must establish a custodial relationship with the child, or provide support or care, for his rights to be terminated by abuse or neglect proceedings only. And more importantly, the difference between those fathers – those that have a relationship or provide support or care and those that do not – justify different treatment under the law.

The record does not support Luke's characterization of himself as a deceived father. Petitioner misrepresents the facts to this Court by alleging that he was "deceived and prohibited" from providing support or care. Petitioner had many opportunities to provide support or care, regardless of the perhaps less than ideal way he was informed of an unplanned pregnancy and his impending fatherhood. A truly deceived father or one that would

have been prohibited from providing support or care would have absolutely no opportunity to do anything. Petitioner had many occasions to help out, and he chose not to. He was not deceived. He knew about or suspected the pregnancy for as many as five months – over half of its duration! His failure to act had nothing to do with when Brandy confirmed his suspicions by informing him that she was pregnant and he was the father.

A very real reason for Petitioner's failure to provide support or care is that he originally agreed to the adoption plan. (T., p. 34). Until May 10, 1999, when he visited the agency Petitioner was going to consent to the adoption. Even after changing his mind about consenting to the adoption, Petitioner still chose to do nothing to care for or support the child or Brandy although it was another four weeks until the Petition for Adoption was filed on June 7, 1999.

The Michigan Adoption Code provides that the trial court must make a determination as to the status of a putative father appearing at a hearing pursuant to a petition to identify father and determine or terminate his rights. MCL 710.36, 710.37 and 710.39. If the father has established a custodial relationship with the child, then his parental rights cannot be terminated except through MCL 712A.2 (neglect proceedings). If the father has provided substantial and regular support or care, according to his ability to do so, then his parental rights cannot be terminated except through MCL 712A.2 (neglect proceedings). The comparison of Luke to a comatose millionaire begs the question as to why, when given an opportunity to behave as a father, he chose not to do so. Petition, p. 17.

The undisputed facts are that Luke provided no support or care to the child or his mother either during the pregnancy or after the birth of the child. Luke asks the Court to presume that had he known of the pregnancy earlier he would have acted to provide substantial and regular support within the time available. He places great emphasis on the period of time in which he and the birth mother did not communicate truthfully with one another. But he does not address the time in which he had an opportunity to act and did not do so. If he had sent support to Brandy, attempted to and/or petitioned to pay the costs of confinement as part of a paternity action, or asked Brandy, her doctor or the hospital about medical expenses and paid even a small amount, he could have become a "do-something" father under MCL 710.39(1). In that case, his parental rights could not have been terminated except for abuse or neglect.

Petitioner's hypothetical stops short of the full analysis. The "comatose millionaire" would be able to solve his problem the same way Petitioner could have by immediately making arrangements or payment of support, costs of confinement, including physician or hospital expenses.

In addition, Petitioner fails to recognize that the comatose father's rights are not automatically terminated because he failed to provide support or care – he is given due process through a full evidentiary hearing at which he can establish that it would be in the child's best interest for him to be awarded custody.

The agency, with which Brandy was working toward adoption, sent a letter to Luke informing him of the

adoption process. In addition to providing him with the date of the birth of the baby, the letter informed him that he might wish to seek legal counsel. See Appendix D. Luke had plenty of time to do something.

Although Petitioner did not raise the issue of equal protection at the trial court, he did so before the Michigan Court of Appeals although it involved a different argument. That Court addressed the equal protection concerns with a well-reasoned analysis, which does not conflict in any way with relevant decisions of this Court. The Michigan Court of Appeals acknowledged that "Equal protection of the law is guaranteed by the federal and state constitutions and that people in similar circumstances should be treated similarly." US Const., Amend XIV; Const 1963, Art 1, para 2; *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 729 (1996). The Michigan Court of Appeals also cited *Lehr, supra*, which recognized the "distinction between an established relationship between a parent and child and the existence of a biological link, with the latter entitled to less constitutional protection than the former."

The Michigan Court of Appeals reasoned that even if a law treats groups of people differently, it would not necessarily violate the guarantee of equal protection. When legislation is challenged as violating the equal protection guarantee, it is subject to judicial scrutiny to determine whether the goals of the legislation justify the different treatment it authorizes. *Doe v Dept of Social Services*, 439 Mich 650, 487 NW2d 166 (1992).

In the case of *Lehr, supra,* this Court addressed the appropriate level of scrutiny to evaluate an equal protection claim. Using a rational basis standard to examine the Michigan Adoption Code, the Michigan Court of Appeals found as rational the classification scheme for putative fathers, rejecting the strict scrutiny standard that was argued by Petitioner.

The Michigan Court of Appeals found further that one of the purposes of the Michigan Adoption Code, was to "provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time." MCL 710.21(a) is legitimate to promote resolution of disputes concerning a putative father's rights where placement of a child (born out of wedlock) for adoption is sought. The Michigan Court of Appeals recognized that MCL 710.39 "represents a careful accommodation of the competing interests at stake. Where a putative father meets the requirements of subsection 39(2) he is treated exactly the same as an unwed father whose child is not subject to adoption."

Petitioner relies upon *Troxel v Granville,* 530 US 57; 120 SCt 2054 (2000), in support of his proposition that strict scrutiny should be the standard to evaluate the two categories of putative fathers. The case does not address strict scrutiny.

The decision of the Washington Supreme Court to deny the petition of the grandparents to extensive visitation was affirmed by this Court since the Washington statute was "breathtakingly broad," allowing for any person to petition for visits at any time. *Troxel, supra,* at 2061.

The statute further allowed the judge to make a determination of best interest without any standards to apply the test. *Troxel, supra,* at 2063. The judge made only two findings and used his own childhood reminiscences to make his decision. *Troxel, supra,* at 2063.

The Michigan statute contains very specific language as to the manner in which to proceed and allows a putative father to determine his fate from his very own behavior. Moreover, the trial court made exhaustive and specific findings of fact and used the twelve-point best interest test required by the Michigan Adoption Code at MCL 710.22(f), and the Michigan Court of Appeals upheld that determination.

More to the point is *Lehr, supra,* a case in which this Court affirmed a decision to deny a putative father's petition to overturn an adoption when the proceedings did not afford him notice and an opportunity to be heard. *Lehr, supra* at 619. New York had established procedures for adoption, which included various ways to deal with putative fathers. The Court found that the statutory distinction, based upon the existence or non-existence of a substantial relationship between the parent and a child is a relevant criterion in evaluating the rights of the parent and the best interest of the child. *Lehr, supra* at 630. The Court found that procedures designed to promote the best interest of the child, to protect the rights of interested third parties, and to ensure promptness and finality were legitimate state interests in facilitating the adoption of young children. *Lehr, supra* at 627, 630. The Michigan statutory procedures allow for notice, an opportunity to be heard, and a specific statutory scheme for the trial court to address the best interest of the child.

MCL 710.39 and its treatment of putative fathers is rationally related to the state's interests as set forth in the Michigan Adoption Code. Further, neither the Michigan Court of Appeals nor the Michigan Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court. As a consequence, this Court should deny Petitioner's request for a writ of certiorari.

III. Does MCL 710.39 violate due process because it requires inquiry into the best interest of the child?

Petitioner's third question, that MCL 710.39 violates due process because it inquires into the best interest of the child, is also a new argument. The parties have not addressed this issue previously, nor has a lower court ruled on this specific argument. The trial court did not address this claim nor did the Michigan Court of Appeals. Petitioner wants to avoid the best interest test because application of the factors results in the termination of his parental rights.

This Court does not review a question not pressed or passed on by the courts below. *Springfield, supra.* Petitioner failed to preserve the due process argument for review, and on that basis this Court should deny his request for a writ of certiorari.

If the Court addresses Petitioner's argument that MCL 710.39 violates due process, the Court should find that the statute is constitutional.

Again, the *Lehr* case recognized the "distinction between an established relationship between a parent and

child and the existence of a biological link, with the latter entitled to less constitutional protection than the former." Where a father has no relationship of any kind with a child, "he does not possess the fundamental right of parenthood." Petitioner cites as authority for a strict scrutiny analysis only cases that address factual situations of legal fathers or those caring for or with existing relationships with their children. Thus, those cases are not relevant to the analysis of this case.

Further, Petitioner alleges that the trial court made a specific finding that he was a fit and able parent. There was no such finding. In fact, in reviewing the extensive analysis given by the trial court on the best interest factors, one can only conclude that Petitioner is not fit and not able to care for the child. Because the best interest test is reasonably related to the state's interest in adoptions, the Court should deny the Petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JULIA A. CLOSE,
Attorney for Adopting Parents

LAURAN F. HOWARD,
Attorney for Birth Mother

APPENDIX A

IN RE RFF, a Minor, 2000 WL 1206039, 242 Mich App 188; 617 NW2d 745 (2000).

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of: RFF, Minor	FOR PUBLICATION August 15, 2000 9:15 a.m.
LAF, Appellant,	No. 221581 Bay Circuit Court Family Division LC No. 99-004496-AD
V	
BJF, Appellee.	

Before: Wilder, P.J., and McDonald and Doctoroff, JJ

MCDONALD, J.

Appellant, LAF, appeals as of right the trial court's order terminating his parental rights to his son, RFF, pursuant to Section 39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39). We affirm.

This case is troubling. We set forth the complete factual context to emphasize the numerous issues we believe the Legislature should consider in examining the statute at issue.

The child involved in this case was conceived out of wedlock while the parties were in high school. The parties dated for approximately a year, beginning in the fall of 1997. Their dating relationship ended in September 1998. According to appellant, in November 1998 appellee, BJF, told him that she had missed a menstrual period.

Appellee recalled this disclosure being made in January 1999. In any event, appellee admits that she lied to appellant several times when he confronted her about rumors at school that she was pregnant. She adamantly denied that she was pregnant several times. However, on April 14, 1999, appellee telephoned appellant and told him that she was pregnant, that he was the father, and that she planned to put the baby up for adoption through an adoption agency. Appellee was planning to attend college in the fall. Appellant indicated that he had plans to enter the Marine Corps and wanted to complete boot camp that summer. Appellant appeared to be in agreement with the adoption plan at that time. Appellee told appellant that he would be receiving paperwork from the adoption agency. She telephoned him again about two weeks later to find out whether he had received the paperwork. They again discussed her plans for college and his plans for boot camp. As far as appellee knew, appellant was still in agreement with the adoption plan. They had not spoken directly since that second telephone conversation.

RFF was born May 9, 1999, and was immediately turned over to the prospective adoptive parents.[1]

Appellant was not informed about the birth at that time. He claimed that he did not know when the baby was due.

Appellant and his mother went to the adoption agency the day after the baby was born. They were going to the agency with plans for appellant to sign the papers

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[1] This case involves a direct placement adoption in which appellee placed the child with a specific couple.

necessary to consent to the adoption. However, when appellant learned that the baby had been born the previous day, he became upset and changed his decision. Appellant refused to sign the consent and he and his mother left the agency. A few days later appellant contacted the adoption agency and arranged another meeting. At the meeting, he told the agency worker that he wanted to see the baby. Appellant was able to see RFF once when he was eight days old. This confirmed appellant's desire to keep his son. Appellant informed the agency that he wanted to keep RFF. He testified that up until that point he felt that the adoption agency worker was going to assist him in getting custody of RFF. Appellant claimed that the agency worker told him that he had a good chance of getting to keep the baby and that they did not need to get a lawyer. He also testified that he was told cost was not an issue because the prospective adoptive parents were paying all the bills. However, appellant testified that when he told the worker that he wanted to keep RFF, her demeanor changed. She talked about the trauma to RFF if removed from the prospective adoptive parents and the bonding among the baby and the prospective adoptive parents. At that point, RFF was only about ten days old. Appellant then stopped dealing with the agency. Appellant admitted that he did not send any support money to appellee before or after the baby was born.

On June 25, 1999, the trial court held a hearing on the petition to identify the father and determine or terminate his rights. After determining the appellant was the father

of the child,[2] the trial court found that appellant had not provided "substantial and regular support or care" for the purposes of subsection 39(2) of the Adoption Code.[3] The trial court acknowledged that appellee may have thwarted appellant's participation in the pregnancy and that the adoption agency could have given him better counseling, but concluded that for whatever reason, appellant had not provided support or care and did not fall under subsection 39(2). Accordingly the trial court continued the hearing to determine whether the best interests of the child would be served by granting custody to appellant or whether appellant's parental rights should be terminated pursuant to subsection 39(1). In a written opinion issued approximately a month after the hearing, the trial court analyzed on the best interest factors and found that it was not in the best interest of RFF to award custody to appellant. Accordingly, the trial court entered an order terminating appellant's parental rights.

Appellant first argues the trial court erred in applying subsection 39(1) rather than subsection 39(2) of the Adoption Code. This is a question of law, which we review de novo. *In re Lang*, 236 Mich App 129, 135-135; 600 NW2d 646 (1999).

MCL 710.39; MSA 27.3178(555.39) provides, in pertinent part:

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[2] Later, DNA testing confirmed the trial court's determination at the hearing. There was some discussion of whether to adjourn the hearing for the testing to take place, but the trial court reserved its ruling and continued the hearing.

[3] MCL 710.39(2); MSA 27.3178(555.39)(2).

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided *substantial and regular* support or care *in accordance with the putative father's ability to provide such support or care* for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of Chapter XIIA. (emphasis added to reflect amendment effective September 1, 1998).

As the Court explained in *In re Barlow*, 404 Mich 216, 229; 273 NW2d 35 (1978):

> Section 39 of the code creates two categories of putative fathers and provides different standards for termination of the rights of each. Putative fathers who have established no custodial relationship with the child, and who have provided no support for the mother or child prior to the notice of hearing, may have their parental rights terminated if the court finds, after examining the father's fitness and ability to properly

> care for the child, "that it would not be in the best interests of the child to grant custody" to him. The parental rights of the second group, those who have established some kind of custodial or support relationship prior to the notice of hearing, are subject to termination only by proceedings under the general jurisdictional provisions of chapter 12A of the Probate Code.

In this case, it is undisputed that appellant has not established a custodial relationship with RFF. It is also undisputed that appellant did not provide any support or care to appellee during her pregnancy or after RFF's birth. Appellant further admits that he has not provided any support or care to RFF since his birth. However, appellant argues that because of the unique circumstances of this case, he should be considered to come within the provisions of subsection 39(2). Specifically, appellant points to appellee's concealment of her pregnancy until less than a month before RFF's birth as the reason why he could not provide support or care during the pregnancy. In addition, appellant argues that the adoption agency misled him after the child was born by assuring him that the costs were being paid by the prospective adoptive parents, further thwarting his ability to have his rights considered under subsection 39(2).

This Court has previously considered the issue whether the father's rights should be determined under subsection 39(2) where a mother thwarts his participation in the pregnancy in *In re Dawson*, 232 Mich App 690; 591 NW2d 433 (1998). In *Dawson*, the mother told the father she planned to have an abortion, later told him he was not the child's father, and then did not inform him the child was born. *Id.*, at 696. Accordingly, this Court held

the father's rights were properly determined under subsection 39(1). *Id.*, at 695.

However, the Legislature amended subsection 39(2) effective September 1, 1998, and in *Dawson*, this Court was interpreting the previous version of the statute. At the time this Court decided *Dawson*, subsection 39(2) provided:

> If the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA [*Dawson, supra* at 693-694.]

The amended statute provides that to come within subsection 39(2), a father must provide *"substantial and regular* support or care *in accordance with the putative father's ability to provide such support or care."* MCL 710.39(2); MSA 27.3178(555.39)(2) (emphasis added).

Appellant argues the statute was amended to address the problem in this case. We disagree.

Statutory interpretation is a question of law that this Court reviews de novo. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut. Ins.* v *Marlette Homes, Inc.*, 456 Mich 511, 515; 573 NW2d 611 (1998), *Dawson, supra* at 696. The starting point for determining the Legislature's intent is the specific language of

the statute. *House Speaker v State Administrative Board*, 441 Mich 547, 567; 495 NW2d 539 (1993); *Dawson, supra* at 696. The Legislature is presumed to have intended the meaning it plainly expressed, and when the statutory language is clear and unambiguous, judicial construction is neither required nor permitted. *Rowell v Security Steel Processing Co*, 445 Mich 347, 353; 518 NW2d 409 (1994); *Dawson, supra* at 696. Where the language employed by the Legislature is susceptible to more than one interpretation, judicial construction is justified. *Rowell, supra* at 353. When construing a statute, the court must use common sense and should construe the statute to avoid unreasonable consequences. *Dawson, supra* at 696. Because the Adoption Code is in derogation of the common law, it must be strictly construed. *Id.*

Appellant argues that the Legislature intended to include fathers who have been deceived about a pregnancy under subsection 39(2) when it added the phrase "in accordance with the putative father's ability to provide such support or care" to the statute. This language does not clearly address the situation presented in this case. At best, the language may be susceptible to multiple meanings. The language could simply address a putative father's financial ability to provide substantial and regular support and care to the mother during pregnancy. The phrase might also be interpreted in a broader sense to encompass the situation in this case. However, even if we view the language as ambiguous, we do not believe the Legislature intended to create a deceived father exception to the requirement that a father provide substantial and regular care and support to the mother during pregnancy in order to come within subsection 39(2). The rationale

for the amendment was identified as follows in the Senate Legislative Analysis, SB 115, August 26, 1998:

> Some people believe that the standard of providing "support or care" is too low for a putative father to receive a hearing on the termination of his parental rights because even a minimal amount of support or care could be used to justify not having parental rights terminated without a hearing. They contend that to earn the right to a hearing on his parental rights, a putative father should have to provide "regular and substantial" support or care for the mother during pregnancy or for the mother or the child after the birth.

This sentiment is continued in the arguments supporting the amendment to the bill. *Id.* The arguments opposing the amendment also reflect that the Legislature did not intend to create an exception where a father has been deceived about the pregnancy:

> While the bill's objective may be laudable, it raises concerns about the elimination of the due process rights of a person who made little or no effort to exercise his responsibility of support. The parental rights of such a person may be automatically terminated under the bill because a mother has decided to terminate her parental rights. *Sometimes, a father may not know in advance of a birth that he is about to become a parent.* (emphasis added]

Accordingly, we disagree with appellant that the statute was amended in order to address the situation presented in this case.

We believe the trial court properly found that appellant's rights should be determined under subsection

39(1). In reaching this holding, we note that the trial court did consider the fact that appellant was deceived about the pregnancy, but found that it could not assume that if appellant had known of the pregnancy earlier, he would have supported the mother. We agree that the statute does not allow such an assumption to be made. We also note that once appellant knew that he was the father and that RFF had been born, he did not provide support or care to the baby. Although appellant argues that he made an effort to be involved and decide what was best for the child, this does not constitute substantial and regular support or care for the purposes of subsection 39(2). See *Dawson, supra* at 695 (filing a notice of intent to claim paternity does not constitute support or care under subsection 39(2)).

While we believe that the statute requires the result we have reached in this case, we repeat the concern expressed by this Court in *Dawson, supra* at 695, 696. We believe that the Legislature should reexamine Section 39 and evaluate whether it is appropriate to place a father who has been deceived about a pregnancy in subsection 39(1) or subjection 39(2) or whether it is appropriate to create a third subsection to address this specific problem. While this Court may feel that it is unfair to consider such a father under subsection 39(1), the Legislature is the appropriate forum for making these types of policy choices.

Next, appellant argues the trial court erred in finding that it was in the best interest of RFF to terminate his parental rights. This Court reviews the trial court's findings of fact for clear error. *In re Cornet*, 422 Mich 274, 277; 373 NW2d 536 (1985); *Lang, supra* at 139.

After hearing testimony on this issue, the trial court made findings on the relevant factors set forth in MCL 710.22(f); MSA 27.3178(555.22)(f).[4]

Under factor (i), the trial court found there were no true emotional ties between appellant and RFF in light of the fact that they only had one brief meeting. The trial court also noted that appellant had not expressed love for the child during his testimony and indicated he wanted to keep the child because of feelings of responsibility and obligation.

Factor (ii) addresses the capacity of the putative father to give the child "love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identify, and culture" of the child. MCL 710.22(f)(ii); MSA 27.3178(555.22)(f)(ii). Under this factor, the trial court stated that appellant had the capacity to give love and affection as a big brother would and emphasized appellant's inability to express the type of guidance he would give to the child. The trial court also found appellant could not identify the religion he was raised in or explain in what religion he would raise RFF. Moreover, the trial court recognized that appellant would raise the child in his large extended family.

Factor (iii) assesses the putative father's capacity and disposition to provide the child with "food, clothing, education, permanence, medical care . . . , and other material needs." MCL 710.22(f)(iii): MSA 27.3178(555)(f)(iii). The trial court found that appellant could not provide these

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[4] The trial court found that factors (iv), (vi), (viii), (ix), and (x) were not relevant in this matter.

things on his own because he was still in high school and worked at a low-paying job. Appellant's parents could provide these material things, but could not provide permanence because appellant eventually planned to move out of his parents' home once he was established.

Regarding factor (vii), the trial court found that appellant and the baby were in good physical health, but that the appellant's maturity was in question. The trial court considered appellant's admissions that he had a temper, that he had threatened suicide after arguing with the child's mother, that he had punched lockers at school, and that he had been suspended from school once after fighting with another child.

The trial court relied heavily on its lengthy findings under factor (xi), "any other factor considered by the court to be relevant." Under this factor, the trial court emphasized that appellant's custody plan was in effect a plan to award custody to his parents and that he would not be the primary custodian of the child. The trial court indicated it had an "overwhelming impression" that appellant was "seeking custody to satisfy his parents and fulfill a sense of duty toward them." In addition, the trial court discussed appellant's immaturity and his lack of "any sense of joy or elation in seeking custody."

Upon considering all of the relevant factors, the trial court found that it was not in the best interest of the child to award custody to appellant. The trial court indicated that the arrangement of allowing the grandparents to be primary custodians until appellant was ready to assume the responsibility did not provide permanency and that if

appellant was viewed independently of his parents, the factors did not favor awarding him custody of the baby.

While we disagree with some of the trial court's findings we are not left with a definite and firm conviction that the trial court made a mistake. Accordingly, we find no clear error on this record. *Overall v Overall*, 203 Mich App 450, 454; 512 NW2d 851 (1994). The facts of this case are substantially different than those of *In re Barlow, supra*, which appellant cites in support of his position. There, although the appellant was young and unmarried, the record in that case did not "disclose the kind of lack of maturity that would support a finding that [the] appellant [was] unable to properly care for his child." *Id.* at 231. The appellant in *Barlow* had finished school, was working full time, and had his own house. Moreover, appellant's reliance on *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996) is misplaced. Appellants' plan regarding his parents' involvement in the child's life extended beyond merely arranging for day care for the baby. Here, appellant's parents were also going to financially support him and help him make decisions. In this difficult case, we defer to the trial court, which was in a better position to view the witnesses. MCR 2.613; *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Appellant next raises two equal protection challenges to Section 39 that he did not raise below. This Court ordinarily will not consider issues raised for the first time on appeal. *Booth v U of M Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). However, we will consider appellant's unpreserved constitutional claims in this case because no questions of fact exist and it is in the interest of justice to do so. *Great Lakes Division of Natl Steel Corp v*

City of Ecorse, 227 Mich App 379, 426; 576 NW2d 667 (1998).

Appellant first claims that subsection 39(1) violates the Equal Protection Clauses of the Michigan and United States Constitutions because it allows his parental rights to be terminated if it is found to be in the best interest of the child, whereas the parental rights of fathers of children who are not subject to adoption can only be terminated in cases of neglect or abuse pursuant to MCL 712A.19b; MSA 27.3178(598.19b).

Statutes are presumed to be constitutional and must be construed as such unless it is clearly apparent that the statute is unconstitutional. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997). Equal protection of the law is guaranteed by the federal and state constitutions. US Const, Am XIV; Const 1963, art 1, section 2; *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996). The Michigan and federal Equal Protection Clauses offer similar protection. *Id.* Generally, equal protection requires that persons in similar circumstances be treated similarly. *Thompson v Merritt*, 192 Mich App 412, 424; 481 NW2d 735 (1991). "[I]t is well established that even if a law treats groups of people differently, it will not necessarily violate the guarantee of equal protection." *Doe v Dept. Social Services*, 439 Mich 650, 661; 487 NW2d 166 (1992). Neither constitution has been interpreted to require absolute equality. *Id.* When legislation is challenged as violative of the equal protection guarantee under either constitution, it is subjected to judicial scrutiny to determine whether the goals of the legislation justify the differential treatment it authorizes. *Id.* at 661-662. The level of scrutiny applied depends on the

type of classification created by the statute and the nature of the interest affected by the classification. *People v Pitts*, 222 Mich App 260, 272-273; 564 NW2d 93 (1997).

Appellant argues that we should subject the statute to strict scrutiny in this case because it impinges upon the fundamental right of a parent to the care, custody, companionship and management of his child. *See Doe, supra* at 662; *Reist v Bay Circuit Judge*, 396 Mich 326, 339-342; 241 NW2d 55 (1976). We disagree. The United States Supreme Court has recognized there is a distinction between an established relationship between a parent and a child and the existence of a biological link, with the latter entitled to less constitutional protection than the former. *Lehr v Robertson*, 463 US 248, 261, 266-268; 103 S Ct 2985; 77 LEd 2d 614 (1983). Where a father has never established a "custodial, personal, or financial relationship" with a child, or has abandoned a child, he does not possess the fundamental right of parenthood. *Id.* It is undisputed that appellant has never established a "custodial, personal, or financial relationship" with RFF. Because a fundamental right is not involved, strict scrutiny is not the appropriate level of scrutiny to evaluate this equal protection challenge. *Doe, supra* at 662. Instead, we will utilize the rational basis standard to review appellant's claim. *See Lehr, supra* at 268, n 27 (concluding that the appellant's equal protection argument based upon the manner in which the statute at issue distinguished among classes of fathers was without merit because the statutory distinction was "rational"); *see also In re ASB*, 293 Ill App 3d 836, 847; 688 NW2d 1215 (1997) (applying the rational basis test to a putative father's equal protection challenge where he had not established any relationship with the child.) Under

this standard, a statute will not be struck down if the classification scheme it creates is rationally related to a legitimate governmental purpose. *Id.*

Michigan's Adoptive Code was enacted for the following general purposes:

1. To provide that each adoptee in this state who needs adoption services receives those services.

2. To provide procedures and services which will safeguard and promote *the best interests of each adoptee* in need of adoption and which will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and *the rights of another, the rights of the adoptee shall be paramount.*

3. *To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.* [MCL 710.21a; MSA 21.3178(555.21a); emphasis added.]

Section 22 defines the term "best interests of the adoptee" as "the sum total of the following factors to be considered, evaluated, and determined by the court *to be applied to give the adoptee permanence at the earliest possible date.*" MCL 710.22; MSA 27.3178(555.22) (emphasis added). Appellant contends that there is no child in need of adoption services in this case because he stands ready, willing, and able to take custody of his child. However, appellant's argument discounts the other legitimate purpose of the Adoption Code. The Michigan Supreme Court has stated that "[I]n enacting the Adoption Code, the Legislature sought, inter alia, to establish procedures to provide for speedy resolution of disputes concerning a

putative father's rights where placement of a . . . child [born out of wedlock] for adoption is sought." *Barlow, supra* at 228-229. Certainly, the Adoption Code's aims to promote the best interest of the child in a prompt and final manner are legitimate.

We also find the difference in treatment of unwed fathers whose children are subject to adoption and unwed fathers whose children are not subject to adoption is rationally related to the state's legitimate interests in providing for the welfare of children. The difference in treatment is based upon different circumstances. When a child is born out of wedlock and there is a dispute regarding whether the child may be placed for adoption, there is an urgent need to determine the parental rights of the unwed father which is not present where adoption is not being considered. We agree with appellee that if section 39 was not available, and trial courts were required to follow MCL 712A.19b; MSA 27.3178(598.19b) in order to terminate a putative father's rights, the adoption process would be much lengthier and costly and the lives of children would be significantly disrupted, often unnecessarily. Because the whereabouts of many putative fathers is often unknown, without section 39, difficulties would arise in timely establishing a basis for termination of the putative father's parental rights. Such difficulties would make adoption a less attractive alternative because adoptive parents would be less likely to risk taking an infant into their homes for the period it would take to terminate the putative father's parental rights.

Moreover, subsection 39(2) represents a careful accommodation of the competing interests at stake.

Where a putative father meets the requirements of subsection 39(2), he is treated exactly the same as an unwed father whose child is not subject to adoption, i.e., his rights may not be terminated except pursuant to MCL 712A.19b; MSA 27.3178(598.19b).[5]

In this case, if appellant had supported his child after he was born, appellant's parental rights could only have been terminated pursuant to MCL 712A.19b; MSA 27.3178(598.19b). However, appellant did not do so. Accordingly, there is a legitimate reason to treat him differently than fathers that have supported their child and from fathers whose children are not subject to adoption. It was not a violation of appellant's equal protection rights to terminate his parental rights pursuant to subsection 39(1).

Finally, appellant argues the Adoption Code violates the Equal Protection Clauses of the federal and state constitutions because it treats biological mothers and fathers differently before their rights are terminated. If a biological mother wants custody of a child, there is no inquiry into the best interest of the child, and absent abuse or neglect, the child would be returned to her upon her filing a petition for return of the child from the temporary placement. In contract, appellant contends he is treated much differently under the Adoption Code

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[5] The statute also provides that such a father's rights may be terminated pursuant to MCL 710.51(6); MSA 21.3178(551.51)(6). This section of the Adoption Code addresses step-parent adoptions.

despite the fact that, according to appellant he "demonstrated that he has the ability to provide food, clothing, shelter and medical care for the child."

Appellant incorrectly asserts that the statute should be subject to strict scrutiny. Gender based classifications are subject to intermediate scrutiny and, to withstand an equal protection challenge, must serve important governmental objectives and be substantially related to achievement of those objectives. *Lehr v Robertson, supra,* 463 US at 266; *Caban v Mohammed,* 441 US 380, 388; 99 S Ct 1760, 60 L Ed 2d 297 (1979); *Craig v Boren,* 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976). Gender-based classifications will be upheld when men and women are not actually similarly situated in the area covered by the legislation in question and the statutory classification is realistically based upon the differences in their situations. *Parham v Hughes,* 441 US 347, 354; 99 S Ct 1742; 60 L Ed 2d 269 (1979).

Appellant's argument fails to recognize that the true distinction created by the statute is the difference between the categories of putative fathers. Once again, we look to subsection 39(2) and the opportunity it provides to putative fathers to have their parental rights terminated only pursuant to MCL 712A.19b; MSA 27.3178(598.19b).[6] It is entirely consistent with the Equal Protection Clause to treat fathers of children born out of wedlock who have nothing beyond a biological link with their children differently than mothers of children born out of wedlock. *Lehr, supra* at 267-268.

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[6] *See* note 4, *supra.*

In short, mothers and fathers of children born out of wedlock are not similarly situated. *Parham, supra* at 355. There are several differences between mothers and fathers of out of wedlock children including that the identify of the mother of a child born out of wedlock is rarely in question and that "only a father can by voluntary unilateral action make an illegitimate child legitimate." *Id.* Moreover, the mother of a child born out of wedlock has made the decision to give birth to the child rather than have an abortion and, as a result of that decision, has carried the child in her womb for nine months. Accordingly, the gender-based classification created by section 39 is substantially related to the achievement of the Adoption Code's legitimate objective. Appellant's equal protection challenge is without merit.

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of:
RFF, Minor

LAF,

Appellant,

V

BJF,

Appellee.

FOR PUBLICATION
August 15, 2000
9:15 a.m.

No. 221581
Bay Circuit Court
Family Division
LC No. 99-004496-AD

Before: Wilder, P.J., and McDonald and Doctoroff, JJ

WILDER, P.J. (dissenting).

I respectfully dissent from the majority opinion affirming the trial court's termination of appellant's parental rights to his son, RFF, pursuant to subsection 39(1) of the Adoption Code, MCL 710.39(1); MSA 27.3178(555.39)(1).

The Adoption Code, MCL 710.21 et seq.; MSA 27.3178(555.21) et seq., establishes procedures to safeguard and promote the best interests of the adoptee and to provide for speedy resolution of disputes concerning a putative father's rights where placement of a child for adoption is sought. *In re Barlow*, 404 Mich 215, 228-229; 273 NW2d 35 (1978); *In re Lang*, 236 Mich App 129, 136; 600 NW2d 646 (1999). The Adoption Code also provides substantive standards for determining when it is appropriate to terminate a putative father's parental rights. *In re Barlow, supra*. Section 39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39), creates two categories of putative fathers and provides different standards for terminating the rights of each:

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial

and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of Chapter XIIA."

At issue in this case is whether the trial court erred, first by concluding that appellant's parental rights should be evaluated under subsection 39(1), and second by concluding that it was in the best interests of RFF that appellant's parental rights be terminated. I would hold that the trial court erred by finding that under the circumstances of this case appellant did not come within the provisions of subsection 39(2).

Amendment of subsection 39(2) was one of the July 1996 recommendations of Lieutenant Governor Binsfeld's Children's Commission. The Commission contended that a putative father who had not established a custodial relationship with the child should have provided "substantial and regular" care or support to the child in order to be accorded subsection 39(2) status in a proceeding to terminate parental rights. The Commission objected that the term "support" might be broadly interpreted so as to apply to circumstances where no child support was paid by the putative father until the Family Independence Agency (FIA) sought to establish paternity, or to circumstances where the child support is paid involuntarily and only because of the entry of a court order. As a result, the Commission urged the adoption of language that would require willing, substantial and regular participation by

the putative father. Report of the Binsfeld Children's Commission, pp 83-84 (1996).

SB 415 was introduced in the Michigan Senate in April 1997, reflecting this recommended change to subsection 39(2). The bill passed the Senate in June 1997, and was immediately thereafter referred to the Michigan House Judiciary Committee. The bill was amended in the House Judiciary Committee on March 10, 1998 with the insertion of the language "IN ACCORDANCE WITH THE PUTATIVE FATHER'S ABILITY TO PROVIDE SUCH CARE AND SUPPORT," qualifying the "substantial and regular" language added to the statute by the Senate. The amended bill passed the House 106 yeas and 0 nays and returned to the Senate, which concurred in the House amendment 31 yeas, 0 nay, 5 excused, 1 not voting. Contrary to the conclusion reached by the majority, I would conclude that the House amendment effectively codified the case by case, multi-factor approach for determining whether the putative father has provided reasonable care and support under the circumstances of the case set forth in *In re Gaipa*, 219 Mich App 80; 555 NW2d 867 (1996).

The majority relies on an August 26, 1998 Senate Fiscal Agency Bill Analysis of SB 415 to support its conclusion that subsection 39(2) as amended does not address the circumstances presented by this case. In my view, this particular bill analysis is not persuasive evidence of the Legislature's intent when it amended subsection 39(2).

First, the bill analysis states on its face that it "was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent." Thus, while the analysis may constitute legislative history, it cannot be considered evidence of legislative intent sufficient to satisfy our duty to interpret legislative enactments in accordance with the plain meaning of specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547; 495 NW2d 539 (1993). Second, the August 26, 1998 bill analysis, completed after the bill was enrolled, is nearly identical to a bill analysis completed on June 20, 1997, just after the bill first passed in the Senate, but well before the House amendment to the bill. Nothing in the bill analysis relied on by the majority acknowledges or gives any meaning to the statutory language added by the House which requires inquiry into the putative father's ability to provide support or care.

Third, to the extent legislative analysis reports should be considered by this Court in determining legislative intent, all of the legislative analysis concerning SB 415 should be considered. The House Legislative Analysis Section report of March 11, 1998, prepared as an addendum to the June 20, 1997 Senate Fiscal Agency analysis of SB 415, states in relevant part:

> The House Judiciary committee amended the bill to require that the assessment of whether a putative father's support or care was "substantial and regular" be measured in accordance with his ability to provide support or care."

Nothing in the language of the statute or the available legislative analysis suggests that a judicial determination

that a putative father who, because he is unaware of the birth mother's pregnancy is unable to provide support or care, is inconsistent with the legislative intent behind the amendment to subsection 3992). The House legislative analysis lends credence to the idea that the House amendment was intended to address the due process concerns identified in the Senate Fiscal Agency analysis. The fact that no legislators voted against SB 415 at final passage further supports this notion. Indeed, in construing a statute, courts should presume that every word has some meaning and should avoid any construction which would render a statute, or any part of it, surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). The construction I urge gives meaning to the phrase added by the House amendment, is consistent with common sense and avoids unreasonable consequences. *In re Dawson*, 232 Mich App 690, 696; 591 NW2d 433 (1998).

The trial court found that appellee's concealment of the pregnancy and the type and quality of counseling received from the counseling agency was irrelevant to appellant's ability to provide support.[7] I would reverse

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[7] At the June 25, 1999 hearing during which the trial court found that appellant was a subsection 39(1) putative father, the trial court state " . . . I find that it's not appropriate for the Court to make the giant leap that had he known he would have provided the support. Or had he gotten better counseling from the Adoption Agency, he would have put in for confinement expenses or whatever. I don't think the law permits the Court to make that kind of leap . . . He certainly had the ability to contribute something had he wanted to do that, even if it was only care and concern and a ride to the doctor or something. He wasn't able to do that, and he didn't do it. [T]he court, therefore,

and remand for specific factual findings on appellant's ability to provide substantial and regular support or care for appellee or RFF, including findings on whether appellant could provide any support and care, much less substantial and regular support and care, where he learned about the imminent birth of RFF only three weeks before delivery; whether the circumstances under which appellant was told about the pending adoption suggested that adoption was a fait accompli, adversely affecting the timing of his attempt to provide care or support to RFF; whether placement of RFF in the custody of the adoptive parents immediately after his birth, making any contact with RFF extremely difficult, also affected his ability to provide care or support to RFF; and whether the counseling provided by the adoption agency may have misled appellant about his legal obligations if he was to decide to seek custody of RFF.[8]

Even if appellant does not come with the provisions of subsection 39(2) I would still reverse the trial court.

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finds that we can't make the leap that he's a Section 2 father because there was no support, and for whatever reason, I don't believe he qualifies under Section 2." The trial court's written opinion on the best interests findings, dated July 22, 1999, refers to *In re Dawson, supra* at 690 in which this Court concluded that MCL 710.39(2) as written prior to the amendment at issue in this case did not account for a situation in which the mother conceals the pregnancy from the putative father and then states "[t]his court reached the same conclusion . . . "

[8] The trial court opinion states that by finding it was not in the best interests of the child to award custody to appellant, it was aware that "it appears we are favoring a birth mother who lied, and an adoption agency which poorly handled the pre-adoption matters."

While I generally agree with the statement of the facts set forth in the majority opinion, several significant facts not mentioned by the majority lead me to the firm and definite conviction that the trial court made a mistake. The record establishes that appellant and his parents were quite shocked to learn that appellant was soon to be a father, and that appellee had made plans to place the baby for adoption. When appellee advised appellant that she was pregnant and would be placing RFF for adoption, she told appellant that her motivation in placing RFF for adoption was her intention to attend college in the fall. Appellant did respond by indicating that he had planned to attend Marine Corps boot camp that summer, however, the record reflects that appellant stated this in a sarcastic manner and not in an apparent acquiescence to appellee's adoption decision. Nevertheless, appellant and his parents worked to gather information that would enable him to make a reasonably informed decision about whether to agree to appellee's plan under the circumstances.

Terry Budek, the pregnancy counselor with Family and Children's Service of Midland (the adoption agency handling the adoption), sent a letter to appellant before RFF's birth in which she described her position as one "to support all members of the birth family." The letter further stated that she was there to provide services including advice about "birthparent rights and choices . . . free of charge." Appellant also testified that Ms. Budek discouraged him from seeking legal advice and that, in response to an inquiry about the expenses for care of RFF and his willingness to pay what he could, she told him that the costs were being taken care of by the adoptive parents.

When appellant went to the adoption agency to consent to the adoption, Ms. Budek was not in the office. A volunteer working at the reception desk in the office connected appellant and his mother with Ms. Budek by phone. Ms. Budek told appellant's mother during this phone contact that RFF had been born, and appellant's mother relayed this information to him. When appellant learned through this telephone contact that RFF had been born, he became upset and began to cry. Appellant acknowledged that he refused to sign the adoption consent at that time, however, the complete record establishes that his refusal was at the behest of the agency receptionist who suggested that appellant go home and think about his decision further.

In deciding it was not in the best interests of RFF to grant custody to appellant, the trial court relied heavily on its determination that appellant was not sufficiently mature to raise RFF and would be heavily relying on his parents for up to several years. Significantly however, the trial court consistently sustained objections to testimony from appellant's dentist, aunt and pastor about their observations and knowledge of appellant's maturity and ability to handle responsibility as irrelevant, even though they had known appellant for long periods of time. I believe this was error which prevented appellant from making a complete record about his ability to parent RFF under the difficult circumstances presented here.

In this regard, I disagree with the majority's conclusion that appellant's reliance on *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996) is misplaced. The Supreme Court's decision noted that from the time Ms. Ireland and

Mr. Smith's child (Maranda) was born in 1991 (both parents were in their mid-teens at the time), to Ms. Ireland's enrollment in the University of Michigan in the fall of 1993, Ms. Ireland's mother and grandmother "provided nearly all the necessary support." *Ireland, supra* at 459. The Court acknowledged that following her enrollment in college, Ms. Ireland would likely continue to reside with her mother as well as on campus at the University of Michigan. *Id.* The Court also acknowledged the likelihood that she would change residences at the university, and that she would move again after completing her studies. The Court pointedly stated that "[s]uch changes, normal for a young adult at this state of life, d[id] not disqualify Ms. Ireland for custody." *Ireland, supra* at 465.

I agree wholeheartedly with this sentiment and believe it applies in this case. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . " *In re Boursaw*, 239 Mich App 151, 176; 607 NW2d 408 (1999), quoting *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). This Court reviews hundreds of cases annually in which parental rights have been terminated only after multiple services (i.e., parenting classes, drug treatment, job training) have been provided over multiple months to the parents by the FIA. In this case, similar services were offered appellant by RFF's grandparents, blood relatives. Given the circumstances of this case, including the concealment of the pregnancy and the "counseling" provided by the adoption agency, appellant's fundamental liberty interest to parents should not

evaporate because he will not be the model parent in the first years of RFF's life.

For the reasons stated above, I would reverse.

/s/ Kurtis T. Wilder

APPENDIX B

IN THE MATTER OF RFF, Bay County Circuit Court, Family Division, decided August 3, 1999 (Docket No. 99-4496-AD) written opinion:

STATE OF MICHIGAN
IN THE 18TH CIRCUIT COURT FOR BAY COUNTY
FAMILY DIVISION

In the Matter of:
RFF, DOB,5-9-99 99-4496-AD
Adoptee.

OPINION

On June 25, 1999 this Court heard testimony to identify the father of the above listed child, and determined from the birth mother's testimony that Luke F. is the father of this child. The mother, with the assistance of Child & Family Service of Midland, had tried to arrange a direct placement adoption. Mr. F. appeared in court with counsel and responded to the adoption petition by seeking custody of his baby.

It was therefore necessary to determine which section of MCL 710.39 applies to this father. The statute sets up two categories of putative fathers, and defines the procedure for terminating rights or awarding custody based on the putative father's relationship with mother/child during pregnancy and after birth. A "Section 2" father who has provided regular and substantial support may not have his parental rights involuntarily terminated except under the provisions of MCL 710.51(6) (commonly referred to as the "2 year no pay, no see" statute) or under the Child Protection Act.

After hearing the testimony of the birth mother and birth father, the court concluded that Luke F. is a "section 1" father. The facts were uncontested. Luke F. had contributed no support whatsoever during the mother's pregnancy or at any time after the child's birth. He had not established any sort of custodial relationship. The parties had broken up before knowing of the pregnancy, and had almost no contact with one another until one month before the birth. Through his attorney, the birth father attempted to show that he was a "section 1" father, only because of the mother's actions which thwarted his attempts to find out the truth about her pregnancy.

The court placed its findings on the record, and alluded to Baby Girl Dawson, No. 2106451, Court of Appeals, dated November 24, 1998. This case recognized the inherent unfairness created by a statute which does not address a category of father who was lied to or thwarted by the mother. However, the court of appeals concluded that "because 710.39, as written, does not account for such a situation, we must conclude in the instant case that respondent did not satisfy 710.39(2)." This court reached the same conclusion, and found that in the case of birth father Luke F., his parental rights may only be terminated pursuant to MCL 710.39(1), by the court inquiring into his fitness and applying the best interests standards.

The hearing continued, with the court evaluating testimony pursuant to MCL 710.22(f). This statute outlines the best interest factors to be considered, to give the adoptee permanence at the earliest possible date. During this phase of the hearing the court heard again from Luke F., and then from his parents, his aunt, his family minister,

and his dentist. The court will briefly summarize this testimony before making its findings.

SUMMARY OF TESTIMONY

The family dentist, Dr. Martha Bamfield, testified as to the wholesomeness of the F. family. She hired Luke's mother as the day care provider for her young child. This person had no close personal knowledge of Luke except to describe him as "a typical 17 year old boy." She could not comment on his ability to parent, except in the context of the senior F.'s having primary care of the baby.

Likewise, the minister, Brian Wickes, testified on behalf of Mr. and Mrs. Gary and Becky F. He has been their pastor for many years and indicated they seldom need his pastoral tending because they are seldom in distress. He knows Luke and indicated Luke no longer attends church, which he commented is not unusual, given his age. He could not comment on Luke's parenting abilities, except to say that he is an "average teenager" and his parents would take "good care" of a baby.

The court also heard from Dawn Wetzel, Luke's aunt. She testified as to the closeness of the extended family, and stated that there is a vast support network of F.'s living within a radius of Luke's parent's home. She wanted the court to know that Luke and his mother would have much support in raising this baby. She also testified that Luke is a responsible young man who cut her 7-acre lawn for two summers, and treats his younger cousins well.

Luke F., age 17, testified that he had originally intended to agree with the adoption plan. He told this to the birth

mother the first time she finally confirmed her pregnancy. When his former girlfriend mentioned the adoption idea, she told Luke she intended to go to college and wanted to give the baby up for adoption. Luke agreed that he had his own plans for the future which entailed joining the Marines, and therefore would probably sign the adoption papers. Luke further testified that he later discussed the matter at length with his parents. His parents went to the agency without him, to gather information. His mother then took him to the Agency to speak with the pregnancy/adoption counselor and to sign papers. On that visit, Luke learned that the baby had been born the day before and was a boy. He described this news as having a very emotional affect on him. He broke down and cried. He wanted to see the baby before making a decision. This was arranged. He recounted how he held RFF, fed him, and, like all new parents, checked his fingers and toes. He decided that he could not sign off on his parental rights.

Luke was questioned about his plan for custody. He admitted that the plan is for his mother to be primary custodian while he finished high school and gets himself settled into a job. He will work every day after school to help his parents defray the costs of raising the baby. He cannot supply medical insurance but his parents can. He will be out of the home from approximately 7:30 a.m. to 7:00 p.m. during the week and will rely on his mother to provide full time child care. He believes he will take over baby chores at night, and use study hall time at school to do his homework. Luke could not tell the court his Grade Point Average. He plans to curtail all social activities and will not date or play sports. He will not enter the Marines

as planned, but instead will stay in the community and try to find a job. Luke admitted that he is still in need of parenting, himself, commenting that my parents "are not done raising me yet."

Luke's parents both testified in support of his decision to seek custody. They indicated they would have supported him in either decision, adoption or custody. They spoke with him at length about his options, and asked him if he could "live with himself" knowing a stranger was raising his first born son. They indicated they can afford to financially support this baby and that they have successfully raised other children. They avowed that "children are our life" and are highly valued within the F family. They had looked into the insurance issue and discovered that if Luke left their household they could keep the baby and maintain medical insurance by adding a rider to their current policy. Both parents acknowledged that Luke is still young and not ready for full time parenting responsibility, and they will be in charge until he is ready.

ANALYSIS OF CHILD CUSTODY FACTORS

The court is required to evaluate the custody request under MCL 710.22(f), which reads:

"Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

***(i)* The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.**

The court finds that there is theoretical affection between the putative father and child; they have had no contact other than one brief meeting, and therefore no true emotional ties exist other than the father's expressed desire to raise the child because he feels the child "would not want to know his parents gave him up," and because he feels a sense of moral obligation to make amends and take responsibility for his part in this unplanned pregnancy.

***(ii)* The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to continue to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.**

The birth father has the capacity to give love and affection as a big brother would; he could not express what type of guidance he would give a child, other than to say he is not ready yet because he is still being raised by his own parents. The birth father could not identify the religion he was raised in, nor verbalize what type of religion he would raise his child in, but would leave that to his parents. He is of the same race as the child and would raise the child with a large extended family on his father's side.

***(iii)* The capacity and disposition of the adopting individual or individuals or, in the case of a hearing**

under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

Luke F. cannot provide these things on his own. He is still in high school and works a low skill/low pay job. His plan is to work to subsidize his parent's expenditures on behalf of the baby. He will not have full capacity on his own to provide the necessities of life until he is out of high school and established on his own, which he admits may take several years. His parents can provide these things. They cannot provide for permanency, because the plan is for the grandparents to raise this baby until a time when the family agrees Luke is ready for custody. The child will experience a disruption in his life when he is moved from the grandparents home to its father's home, perhaps several years away.

***(iv)* The length of time the adoptee has lived in a stable, satisfactory environment and the desirability of maintaining continuity.**

The factor does not apply to the case at hand. The infant has lived in the prospective adoptive home since birth, but that has been approximately 9-10 weeks as of the date of this opinion. The court believes that a move to another home at this early date would not be significantly disruptive, given the age of the child.

***(v)* The permanence, as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the putative father.**

The grandparent's home is permanent to themselves. It is permanent to the putative father for at least one more year. His plans after graduation are uncertain. He may decide to move out and leave the child with his parents; his parents have already contemplated that they may keep the baby if Luke moves out; but the permanence of the 17 (now 18) year old father's residence is unknown at this time.

***(vi)* The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.**

Morality was not a factor in this hearing.

***(vii)* The mental and physical health of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father, and of the adoptee.**

From all accounts, the putative father and the adoptee are in good physical health. The mental health, or perhaps the maturity, of the putative father was called into question during testimony. The putative father admitted to a strong temper, a tendency toward tantrums, some violent outbursts, one leading to his suspension from school, and a false suicide threat to the mother of the baby.

***(viii)* The home, school, and community record of the adoptee.**

This was not a factor due to the baby's age.

***(ix)* The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court**

considers the adoptee to be of sufficient age to express preference.

This factor was not considered due to the child's infancy.

***(x)* The willingness and ability of the adopting individual or individuals to adopt the adoptee's siblings.**

This was not a factor as there are no siblings.

***(xi)* Any other factor considered by the court to be relevant to a particular adoption proceeding or to a putative father's request for child custody.**

The most significant factor in this case is weighing the father's custody plan. It is, in effect, a plan to award custody to third party grandparents. The court cannot find fault with the proposed custodial home, except that Luke will not be the primary custodian. He asks to be custodian in name, but in reality he seeks to obtain custody for his parents.

The court does not believe the intent of the statute permits us to award custody to third parties. After analyzing the factors above, the court finds that it is not in the best interests of the minor child to award custody to the father, when the actual plan is for grandparent custody.

The court is aware that by reaching this conclusion, it appears that we are favoring a birth mother who lied, and an adoption agency which poorly handled the pre-adoption matters.

The parties live in a small town. They were high school friends whose romance was rocky from the start.

When they broke up, there was no further communication, even when Brandy discovered she was pregnant. She and her parents made the adoption arrangements without notifying Luke or giving him any time to reach a satisfactory conclusion on his own. This young man was faced with final verification of the pregnancy just four weeks before the birth. He was not notified of the birth until he happened into the Agency on the day after it occurred. He admitted to feelings of anger, and so did his mother, at not being let in on the news in some formal way. He denies these feelings had anything to do with his decision to seek custody.

Yet, it is clear that Luke F. himself is not ready for custody. He has no clear plan for his life. He clearly is not ready for parenthood in any real sense, and he admits this. He searched for some way to allow the burden to pass, by disputing the birth mother's time frame regarding their sexual contact, and by seeking biological verification of paternity before the court made its final ruling.

The court is faced with the overwhelming impression that Luke is seeking custody to satisfy his parents and fulfill a sense of duty toward them. Luke did not express love or affection for the child; he expressed a sense of obligation. "I need to take responsibility for my actions." When asked what plans he had to raise the child in a religion or creed, Luke could not answer. He knew the name of his former church but not the denomination. He could not identify it as Christian or outline any of its major tenets. He could not articulate any of his own beliefs, and repeated that his values are "don't give up what's mine" and "be responsible for my actions."

Luke's immaturity was revealed in other ways. He admitted that he has a temper. Almost every witness mentioned his temper and then downplayed it as being "normal boy stuff." His mother allowed that "we have our moments" but "the lines of communication are still open." Luke admitted that he had been kicked out of school recently for fighting; that he had punched lockers in a fit of anger; that he had given himself a black eye while fighting with the birth mother; and that he had threatened suicide to her during one of their fights. He claimed he didn't mean it and he testified that he often says things in anger that he does not mean.

He did not reveal any sense of joy or elation in seeking custody, but indicated a sense that this is his punishment for being irresponsible. He will have to give up the life of a teenager, and his cherished plans to enter the Marine Corps, in order to fulfill his moral obligation to keep the child within the extended F. family.

The court considered case law, which states that a person's age in and of itself is not a factor; but that maturity is a factor. *In the matter of Baby Boy Barlow,* 404 Mich 216 (1978). Parental assistance for child care is acceptable, but total reliance on grandparents to the extent that the putative father abdicates his care of the child to their parents, is not appropriate. *In re Ballard,* 219 Mich App 329 (1996).

This court concludes that the custodial arrangement in this case exceeds the bounds of the statute in that grandparents will be the primary custodians of the minor child until the putative father is graduated from high

school, gainfully employed, and deemed by his own parents to be ready for custody. All interested parties concurred that this process could take years. This arrangement does not provide the permanency contemplated by the adoption statute. When viewed independently of his parents, the factors do not favor awarding custody of an infant to Luke F. Since it is not in the best interests of the child to award custody to the father, the parental rights of Luke F. shall be terminated.

/s/ July 22, 1999
Karen A. Tighe
Judge of Circuit Court
Family Division

APPENDIX C

In re RFF, a Minor, 618 NW2d 575 (2000):

Order
Entered: October 24, 2000

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice

In Re RFF, Minor.

LAF,

Appellant,

V

BJF,

Appellee.

Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices
SC: 117555
COA: 221581
Bay CC:99004496AD

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The application for leave to appeal from the August 15, 2000 decision of the Court of Appeals also is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanaugh, J., would grant leave to appeal.

Corrigan, J., dissents and states as follows:

I would grant leave to appeal in this very troubling termination of parental rights case for the reasons stated in Judge WILDER's dissent. First, the Court of Appeals majority's construction of section 39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39) appears dubious

at this juncture. I further question the majority's application of the law that they have construed to this case. Section 39 creates two categories of putative fathers and provides different standards for terminating their rights. If the majority has correctly construed the statute, then the current statutory scheme may well violate appellant-father's constitutionally protected liberty interest in the custody of his son. In any event, appellant's attempt to exercise his rights appears to have been effectively thwarted in this case. These important questions warrant our full review.

Appellant-father, then seventeen and a junior in high school, and appellee-mother, then eighteen and a senior in high school, conceived a child in summer, 1998. Their relationship ended in September 1998, shortly after appellee became pregnant. Appellee resumed dating her former boyfriend. Although rumors circulated regarding appellee's pregnancy, she persistently deceived appellant regarding her condition. She did not disclose her pregnancy to appellant. It was not until April 14, 1999, after she had already arranged for the baby's adoption and was working with an adoption agency, that she disclosed the pregnancy to appellant. During their conversation, appellee informed appellant of her desire to attend college after graduation and tentatively secured appellant's agreement to her adoption plan. Appellant immediately informed his parents about the pregnancy and they arranged to visit the adoption agency on May 10, 1999. He was given no information regarding his son's birth and the child was immediately placed with the prospective adoptive parents without any notice to appellant of his child's birth or whereabouts.

An adoption worker told appellant of the birth during his family's visit to the adoption agency on May 10, 1999. After learning of his son's birth, appellant began to cry and would not consent to the adoption. He desired to raise his son with the help of his parents, who agreed to abide by his decision. Appellant arranged an appointment with his parents and the adoption worker to discuss his desire to keep his son. One week after his son's birth, he was finally allowed to see his son at the adoption agency in the presence of the adoptive parents. This visit reaffirmed appellant's desire to obtain custody of this son. During this time, adoption agency workers also misled appellant. The adoption agency advised appellant that because the adoptive parents were paying all the costs, he need not furnish any support. Further, the adoption worker advised appellant that he had a good chance of obtaining custody. Appellant's family thereupon retained counsel. Counsel moved on May 28, 1999, for the return of the child and a June 25, 1999, hearing date was set. On August 3, 1999, the Court terminated appellant's parental rights after finding it was not in the child's best interests to be reared by his natural father.

The Michigan Adoption Code divides fathers into two categories: those who have established a custodial relationship with the child or have provided substantial and regular support or care in accordance with their ability to provide such support or care for the mother during pregnancy or for either mother or child after birth ("do-something" fathers) and those who have not ("do-nothing" fathers). Subsection 2 provides that a "do something" father's parental rights may be terminated only

"by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA." In essence a do-something father's rights may be terminated only for abuse or neglect. By contrast, a do-nothing father's rights may be terminated under section 39(1), requiring the court to "inquire into his fitness and his ability to properly care for the child and [to] determine whether the best interests of the child will be served by granting custody to him. If the court finds that it wold not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child."

While appellant never provided substantial and regular support or care, appellee's deception and the agency's misrepresentation were factors effectively destroying appellant's ability to provide support. Appellant correctly contends that appellee's deception regarding her pregnancy made it impossible for him to provide support or care during the pregnancy. He notes that section 39(2) requires a father to provide substantial and regular support or care in accordance with his ability to provide such support or care. Thus, appellant argues, the father's duty under section 39(2) is coextensive with his ability to comply with the duty. In addition to appellee's deception regarding the pregnancy, appellant contends that the adoption agency mislead him after the child was born by assuring him that the adoptive parents would pay all costs.

The Court of Appeals majority rejected appellant's construction because the statutory language did not clearly address the situation in which a mother deceives a father about her pregnancy. The Court stated that the word "ability" could be narrowly interpreted to include

only financial ability, or it could be construed "in a broader sense to encompass the situation in this case." 242 Mich App ___, ___ (2000). Assuming the language was ambiguous, the Court interpreted the statute not to apply to deceived fathers when it amended the statute in 1998 to add the "ability" language. The Court nonetheless urged the Legislature to consider how a deceived father should be treated under section 39.

In dissent, Judge WILDER examined the legislative history and disagreed with the majority's interpretation of the Legislature's intent. He urged a construction that would permit courts to take into account a mother's deception when determining a father's ability to provide support or care. Judge WILDER favored a reversal and remand for specific factual findings on appellant's ability to provide substantial and regular support or care for appellee or the child in these circumstances. Alternatively, Judge WILDER would have reversed the trial courts findings on the statutory best interest factors under section 39(1).

I question both the mode and result of the Court of Appeals majority's statutory analysis. A court's obligation when examining a statute is to discern the legislative intent that may reasonably be inferred from the test of the statute itself. *People v McIntire,* 461 Mich 147, 152-153 (1999). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Id.*, p 153. Non-textual modes of construction invariably lead to judicial

speculation about the Legislature's unstated intent and the injection of the court's own policy preferences. *Id.*

The Court of Appeals majority here looked beyond the plain words of section 39 after assuming that the statute was ambiguous. The majority never identified, however, why the test of section 39 was "internally inconsistent or ambiguous, thereby giving rise to the need for interpretation." *Id.* p. 157, n 9. Rather than struggling with the meaning of the words in the statute, the majority hypothesized that the Legislature might have restricted the term "ability," to a meaning that did not include deception by the mother. The majority suggested that the Legislature may have intended "ability" to mean "financial ability," even though no such qualification is found in the text of the statute. In essence, the majority speculated that the Legislature did not mean what it clearly stated. Judicial construction is permitted only when the words of a statute are internally inconsistent or ambiguous, not when the court speculates that the Legislature might have meant something other than what it said.

Given the importance of this statute and the enormous stakes in this case, I would grant leave to apply the correct principles of construction. The father's duty is to provide substantial and regular support or care in accordance with his "ability to provide such support or care." The father's duty is thus conditioned upon his "ability" to fulfill that duty. "Ability" means the "power or capacity to do or act physically, mentally, legally, morally, or financially." *Random House Webster's College Dictionary* (2000). Thus, a father's financial power or capacity to provide support or care may be only one aspect of the ability analysis under the statute. A father may also lack

the physical, mental, legal, or moral power or capacity to act. When a father lacks knowledge of a pregnancy because of the mother's deception and is induced not to act by the agency's misrepresentation, he arguably lacks the power or capacity to provide support or care, since he does not even know that support or care are needed!

A separate problem exists regarding the application of section 39 to underage fathers. Does an underage father ever have the "ability" to provide support or care? If a minor cannot sign a contract or be subject to a support order, how could he have any legal "ability" to provide support or care? If the Court of Appeals majority's construction is correct, then section 39 arguably would never apply to underage fathers, and the statute would then effectively collapse in upon itself. It effectively deprives all underage fathers of whatever rights they enjoy.

If the majority has correctly construed the statute, I would still grant leave to consider the serious due process issues raised by the statute's application in these circumstances. If the statute really does permit a deceived father to fall through the cracks in this fashion, then it impinges upon appellant's fundamental liberty interest in the custody of his child.

In *Stanley v Illinois*, 405 US 645 (1972), the Court held that an unmarried father was entitled to a hearing on his fitness as a parent before the state could take away his children. Illinois allowed the state to circumvent neglect proceedings for unwed fathers. It allowed termination of unmarried mothers' rights only after a hearing and proof of neglect, but unmarried fathers lost their rights without

a hearing on parental fitness and proof of neglect. Invalidating Illinois' scheme, the Supreme Court noted:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. [*Id.*, p 651 (citations and internal quotation omitted.)]

The right to conceive and raise one's children is fundamental. *Id.* "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." *Id.* (citations omitted).

The Supreme Court recently reaffirmed the liberty interest of parents in the custody, care, control, and upbringing of their children. In *Troxel v Granville*, 530 US ___; 120 S Ct 2054; 147 L Ed 2d 49 (2000), the Court invalidated a Washington statute that permitted anyone to petition for visitation with children and allowed a judge to award visitation upon a showing that it would be in the best interest of the children. The Supreme Court noted that the interest of parents in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*, 120 S Ct 2060. The rights of parents under the Due Process Clause includes their right to establish a home and bring up children. *Id.* "It is cardinal with us that the

custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*

The Washington statute did not require a finding that the parents were unfit before the judge awarded visitation to a third party. This scheme contravened the constitutional presumption that fit parents act in the best interests of their children. *Id.*, 120 S Ct 2061. The statute impermissibly placed the best interest determination solely in the hands of a judge and accorded no deference to the parent's judgment. "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*, 120 S Ct 2061.

Section 39 raises many constitutional questions. If a father's failure to provide support or care is due solely to the mother's deception, then is he denied equal protection under the Court of Appeals majority's construction of the statute? A similarly situated father who was not deceived would have an opportunity to provide support or care; his rights could then be terminated only upon a showing of abuse or neglect. The deceived father, however, will receive no such benefit; his rights may be terminated under section 39(1) solely on the basis of a judge's determination of the best interests of the child.

I also question whether section 39(1) accords the constitutionally required deference to fit fathers who were deceived. It does require the court to inquire into

the father's fitness and ability to care for the child. It then goes on, however, to require the court to terminate the father's rights upon a finding that it would not be in the best interest of the child to grant custody to the father. Section 39(1) does not expressly require the court to find that the father is unfit before terminating his rights. The statute instead allows termination upon application of a free-floating best interest evaluation by a judge.

I do not know the correct outcome for this troubling case. I am not certain whether deceived fathers fall within the purview of section 39(2) and, if not, whether their constitutional rights are violated. In light of the enormous consequences of the Court of Appeals majority's decision, however, I would not let its questionable analysis stand. We should grant leave.

APPENDIX D

FAMILY AND CHILDREN'S SERVICE OF MIDLAND

1714 EASTMAN AVENUE
P.O. BOX 2086 MIDLAND, MICHIGAN 48641-2086
631-5390 Fax: 631-0488
Bonnie M. McManus, ACSW, Executive Director

April 21, 1999

Mr. Luke

Dear Luke:

As you are aware Brandy ___ has been working with our agency in adoption planning. You are being contacted because Brandy has named Luke ___ as the putative father of her unborn child. I am a pregnancy counsel, whose position is to support all members of the birth family. I would like to meet with you and discuss ways in which I might help in the necessary decisions that will be asked of you. The services I provide to birth families are preparation and planning, birthparent rights and choices, available resources, and general counseling as it pertains to adoption. My services are available free of charge.

Enclosed please find several documents that require your careful attention. The Notice to Putative Father and Custody Statement is one way for you to indicate your intentions in this adoption. I would prefer we meet to clarify this document in person. If you prefer, you may complete this document in front of a notary of your choice and mail to the agency. Because Luke is a minor, this form, must be also signed by at least one parent for the adoption to proceed. Banks, credit unions and real estate companies typically have notary publics. This notary has a notary

public on staff, if you choose to sign when we meet. You may also consult an attorney.

Also enclosed are medical and social history forms. This information will be invaluable to the child and adoptive parents. This information is kept strictly confidential. Identifying information (names, addresses, telephone numbers, places of employment) will not be shared without written consent from you. Include only biological relatives in your histories. I realize these forms can take some time but, please complete and return them by May 15, 1999 or sooner, if possible. If you are aware of any family medical condition that could place the infant at risk, please inform me of this as soon as possible. Also, it is necessary for the Notice to Putative Father and Custody Statements be completed as soon as possible. Three copies of this form are enclosed for signatures. If you choose to have notarized outside of the agency, please retain one copy and return the remaining two.

I encourage you to call me if you have any questions or would like to discuss any questions you may have.

Sincerely,

Terri L. Budek, BSW RSW
Pre-and Post Natal Services Coordinator

TB/ds

Enc. Medical and Social History Forms
Notice to Putative Father and Custody Statement
(Three copies)

APPENDIX E

STATE OF MICHIGAN JUDICIAL CIRCUIT- FAMILY DIVISION	NOTICE TO PUTATIVE FATHER AND CUSTODY STATEMENT	FILE NO.

In the matter of Unborn child,
minor

TO: Luke _____, an _ adult
Putative father X unemancipated minor.

1. Brandy X intends to file a petition,
_has filed a petition with the court stating that:

a. She is the mother of __ _____.
Name of child (type or print)
X an unborn child expected on or about
May 8, 1999
Date

b. You are the father of the child.

c. She X intends to sign a release or consent relinquishing her rights to the child.
__has joined with her husband in a petition for adoption.

2. The law provides that as a putative father, you have a right to request custody of the child. The law also provides that your failure to appear at the hearing on the petition shall constitute a denial of your interest in the custody of the child, which shall result in the court's termination of your parental rights to the child.

3. If you do not want to request custody of the child, complete the section below and mail or deliver to _____.

CUSTODY STATEMENT OF PUTATIVE FATHER

1. I voluntarily state: (check one)

__ I am the father of the child and deny any interest in the custody of the child.

__ I may be the father of the child and deny any interest in the custody of the child.

__ I am not the father of the child.

2. I give up my right to notice of the time and place of hearing to identify the child's father and determine or terminate his rights.

I declare that this "Custody Statement of the Putative Father" has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Date	Date
Signature of witness	Signature of putative father
Name of witness (type or print)	Address
Address	City, state, zip Telephone no.
City, state, zip Telephone no.	Signature of parent, guardian, or guardian ad litem of minor putative father

Do not write below this line – For court use only

PCA 316 (9/97) NOTICE TO PUTATIVE FATHER AND CUSTODY STATEMENTMCL 710.36; MSA 27.3178(555.36),MCL 710.37; MSA 27.3178(555.37), MCR 5.751

APPENDIX F

MCL 710.39; MSA 27.3178(555.39):

"(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of Chapter XIIA."

APPENDIX G

MCL 710.22(f)

"Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.

(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to continue to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(iv) The length of time the adoptee has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(v) The permanence, as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the putative father.

(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.

(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father, and of the adoptee.

(viii) The home, school, and community record of the adoptee.

(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express preference.

(x) The willingness and ability of the adopting individual or individuals to adopt the adoptee's siblings.

(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding or to a putative father's request for child custody."

APPENDIX H

USCA Const. Amend. 14:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX I

28 USCA 1257(a):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."